

Chapter 2: Reporting & Investigating Suspected Child Abuse & Neglect

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In this chapter. . .

This chapter covers the initial stages of a child protective proceeding, from reporting and investigating suspected child abuse or neglect under the Child Protection Law, MCL 722.621 et seq., to filing petitions for court jurisdiction concerning that abuse or neglect under the Juvenile Code, MCL 712A.1 et seq. The broad statutory definitions of “child abuse” and “child neglect” in the Child Protection Law are provided. The chapter also describes the persons required to report suspected child abuse or child neglect to the Department of Human Services (DHS), the required procedures for and limitations on a subsequent DHS, law enforcement, or joint investigation of the suspected abuse or neglect, and required responses by DHS following their investigation. Civil and criminal liability and immunity from civil liability are also discussed.

2.1 Definitions Under the Child Protection Law

The Child Protection Law, MCL 722.621 et seq., governs reporting and investigating suspected child abuse and neglect, and provides for or requires the filing of petitions to initiate child protective proceedings under the Juvenile Code, MCL 712A.1 et seq. The following definitions apply to the investigation and reporting stage of child protective proceedings.

The definitions of “child abuse” and “child neglect” under the Child Protection Law are much broader than the statutory bases for Family Division jurisdiction in child protective proceedings contained in the Juvenile Code.* These broad definitions and the mandatory reporting requirements reflect the basic purpose of the Child Protection Law, which is to discover and investigate *possible* cases of child abuse or neglect, and of child protective proceedings, which is to protect children and prevent abuse or neglect, rather than to punish abusive or neglectful adults. See, generally, *People v Gates*, 434 Mich 146, 161–62 (1990) (protective proceedings distinguished from criminal proceedings).

The Court of Appeals has held that the definitions of “child abuse” and “child neglect” in the Child Protection Law should be construed to exclude harms not expressly listed in those definitions. *Mich Ass’n of Intermediate Special Educ Administrators v Dep’t of Social Services*, 207 Mich App 491, 497-98 (1994). Thus, the Court refused to give the term “mental injury” in the definition of “child abuse” an expansive reading to include a parent’s

*See Section 4.2 for a discussion of these statutory bases.

refusal to follow the educational recommendations of a school district. *Id.* at 498.

The Child Protection Law has survived overbreadth and vagueness challenges. See *People v Cavaiani*, 172 Mich App 706, 711–15 (1988).

A. “Child Abuse”

Under the Child Protection Law, “child abuse” is defined as “harm or threatened harm to a child’s health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment, by a parent, a legal guardian, or any other person responsible for the child’s health or welfare or by a teacher, a teacher’s aide, or a member of the clergy.” MCL 722.622(f). “Threatened harm” means “[a]n act or failure to act which places a child in a situation where [child abuse] is likely to occur or family history is such that past abusive or neglectful behavior is indicative of future behavior (absent the resolution of the past child safety issues).” DHS *Services Manual*, CFP 711-5. A “child” is a person under age 18. MCL 722.622(e). A “member of the clergy” is “a priest, minister, rabbi, Christian science practitioner, or other religious practitioner, or similar functionary of a church, temple, or recognized religious body, denomination, or organization.” MCL 722.622(l).

Note: The current version of MCL 722.622(f) became effective on December 30, 2002. 2002 PA 693. Previously, “child abuse” was defined as “harm or threatened harm to a child’s health or welfare by a parent, a legal guardian, or any other person responsible for the child’s health or welfare, or by a teacher or teacher’s aide, that occurs through nonaccidental physical or mental injury; sexual abuse; sexual exploitation; or maltreatment.” The Court of Appeals in *People v Beardsley*, 263 Mich App 408, 416 (2004), held that the previous definition of “child abuse” required a mandatory reporter to report the abuse to DHS only when the suspected perpetrator is a parent, legal guardian, teacher, teacher’s aide, or other person responsible for the child’s health and welfare. The Court rejected the argument that sexual abuse, sexual exploitation, or maltreatment by *any* person must be reported. The Court noted that 2002 PA 693 amended the definition of “child abuse” to clarify that “the physical or mental injury, sexual abuse or exploitations, or maltreatment must be committed by one of the enumerated persons— not just any person – in order to be a mandatory reportable act[]” under the Child Protection Law. *Beardsley*, *supra* at 416 n 3.

*See Section
2.1(C), below.

Department of Human Services (DHS) Children's Protective Services (CPS) will not investigate reports of suspected child abuse by teachers or teacher's aides: instead, CPS will refer such reports to the appropriate law enforcement agency. This is because teachers and teacher's aides are not "persons responsible for a child's health or welfare."* The *DHS Services Manual*, CFP 712-6, states:

"Teachers and teachers' aides are included in the definition of "child abuse" in the Child Protection Law but they are not included in the definition of "person responsible for the child's health or welfare." DHS is only authorized to investigate alleged abuse by a "person responsible for the child's health or welfare." So complaints alleging child abuse by teachers or teachers' aides are appropriately referred to law enforcement and are NOT investigated by the Department.

"Similarly, law enforcement is responsible for the investigation of complaints of abuse allegedly committed by other persons not responsible for the child's health or welfare. This includes police officers, neighbors, strangers, youth group leaders and child care aides (baby-sitters who provide day care in the child's home)."

This applies to clergy members as well. See MCL 722.623(6), discussed in Section 2.7, below.

*See Sections
2.8 and 2.21,
below.

Nonaccidental physical or mental injury. The *DHS Services Manual*, CFP 711-5, includes in its definition of "nonaccidental physical injury" "temporary disfigurement . . . which requires medical intervention or which occurs on a repetitive basis." The definition also lists several serious physical injuries. MCL 722.628(3)(c) defines "severe physical injury" as "brain damage, skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprains, internal injuries, poisoning, burns, scalds, severe cuts, or any other physical injury that seriously impairs the health or physical well-being of a child." The presence of a "severe physical injury" requires DHS cooperation with law enforcement officials and the filing of a petition in the Family Division of Circuit Court.*

"Mental injury" is defined in *DHS Services Manual*, CFP 711-5, as follows:

". . . A psychological condition (diagnosed by a mental health practitioner) caused by physical or verbal acts, omissions (including the denial of appropriate treatment), or maintaining an environment, by parent or person responsible for the child's health or well-being which:

. . . renders the child chronically anxious, agitated, depressed, socially withdrawn, psychotic, or in reasonable fear that his or her life and/or safety, or that of another family member is threatened, or;

. . . chronically interferes with the child's ability to accomplish age-appropriate milestones.

“Note: [DHS] staff cannot make a finding of a psychological condition without supporting documentation (e.g. psychological evaluation) from a mental health practitioner outside of [DHS].”

“Sexual abuse” is defined as engaging in “sexual contact or sexual penetration,” as those terms are defined in §520a of the Penal Code, with a child:

“Sexual contact” means the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.

“Sexual penetration” means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

MCL 722.622(w) and MCL 750.520a(k) and (l). In criminal cases, the Michigan Court of Appeals has established an objective or “reasonable person” standard when determining whether a sexual touching was for the purpose of sexual arousal or gratification. Therefore, while a criminal defendant must intend the sexual touching, his or her subjective or specific intent as to sexual arousal or gratification is irrelevant. See *People v Fisher*, 77 Mich App 6, 12–13 (1977), and *People v Piper*, 223 Mich App 642, 646–47 (1997).

“Sexual exploitation” includes allowing, permitting, or encouraging a child to engage in prostitution, or allowing, permitting, encouraging, or engaging in the photographing, filming, or depicting of a child engaged in a listed sexual act as defined in . . . MCL 750.145c.” MCL 722.622(x). MCL 750.145c(1)(h) defines a “listed sexual act” as sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity.

B. “Child Neglect”

“Child neglect” is defined as “harm or threatened harm to a child’s health or welfare by a parent, legal guardian, or any other person responsible for the child’s health or welfare that occurs through either of the following:

(i) Negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care.

(ii) Placing a child at an unreasonable risk to the child’s health or welfare by failure of the parent, legal guardian, or other person responsible for the child’s health or welfare to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of the risk.” MCL 722.622(j)(i)–(ii).

“Threatened harm” means “[a]n act or failure to act which places a child in a situation where [child neglect] is likely to occur or family history is such that past abusive or neglectful behavior is indicative of future behavior (absent the resolution of the past child safety issues).” *DHS Services Manual*, CFP 711-5. A “child” is a person under age 18. MCL 722.622(e).

Negligent supervision. Improper supervision may constitute “child neglect.” “Improper supervision” is defined in *DHS Services Manual*, CFP 711-5, as:

“ . . . placing the child in or failing to remove the child from a situation that a reasonable person would realize requires judgment or actions beyond the child’s level of maturity, physical condition, or mental abilities and that results in bodily injury or a substantial risk of immediate harm to the child.” (Footnote omitted.)

The DHS will not investigate allegations of parental substance abuse if that is the only allegation made. See *DHS Services Manual*, CFP 712-6. However, a parent’s daily use and sale of controlled substances in the child’s home that results in improper supervision of the child may be “child neglect.” *People v Wood*, 447 Mich 80, 86–87 (1994).

Failure to protect. The *DHS Services Manual*, CFP 711-5, defines “failure to protect” as follows:

“Failure to Protect means:

. . . knowingly allowing another person to mistreat or abuse the child without taking appropriate measures to stop such mistreatment or abuse and prevent it from recurring when the

person is able to do so and has, or should have had, knowledge of the mistreatment.

“Assess whether the child is in danger of serious or immediate harm based on failure to protect a child against a non-offending caretaker of children in a domestic violence situation. A non-offending caretaker will not be held responsible for Neglect, based on failure to protect if the child is not at imminent risk. If the child is at imminent risk, determine what steps the non-offending caretaker has taken to protect the child.

“A caretaker who would otherwise be considered a non-offender but who

1. directly harms his/her child(ren),
2. fails to protect a child who is at imminent risk,
3. allows a child to be seriously harmed,
4. or has a historical record that shows a documented pattern of domestic violence where the non-offending caretaker has been unable to protect the children, must be held responsible for their abusive or neglectful behavior.

“In the above situations, the person previously referred to as the nonoffending caretaker is also a perpetrator.”

The failure to protect a child from sexual abuse may also constitute “child neglect” if the parent or person responsible for the child’s health or welfare knew or should have known that the abuse was occurring and failed to intervene. *Spikes v Banks*, 231 Mich App 341, 352 (1998), and *Phillips v Diehm*, 213 Mich App 389, 396 (1995).

Domestic violence. “Domestic violence is a pattern of assaultive and coercive behaviors, including physical, sexual, and psychological attacks as well as economic coercion, that adults or adolescents use against their intimate partners.” DHS *Services Manual*, CFP 712-6. The DHS will not investigate complaints that contain only allegations of domestic violence. To be accepted for investigation, a complaint must “include information indicating the domestic violence has resulted in harm or threatened harm to the child.” *Id.*

In cases involving domestic violence, the presence of any of the following factors may indicate threatened harm of a child:

“• A weapon was used or threatened to be used in the domestic violence incident.

“• Animals have been deliberately injured or killed by the perpetrator.

“• A parent or other adult is found in the home in violation of a child protection court order or personal protection order.

“• There are reported behavioral changes in the child (e.g. child’s teacher describes that the child used to be an involved and highly functioning student and now is withdrawn, doing poorly in coursework, or acting out with violence).

“• Reported increase in frequency or severity of domestic violence.

“• Threats of violence against the child(ren).” DHS *Services Manual*, CFP 712-6.

DHS *Services Manual*, CFP 713-8, states that in cases involving domestic violence, the following factors should be considered when determining whether to confirm an allegation of “failure to protect” against a non-offending parent:

“• Review CPS history for prior CPS services and the responses of the victim of domestic violence to past situations involving domestic violence.

“• Assess any actions taken by the victim of domestic violence to protect the child(ren) from harm.

“• Assess protective strategies the domestic violence victim may have employed in an attempt to protect the child(ren) such as:

- Disciplining the child so the perpetrator does not.

- Remaining in the home to protect the child(ren) (the perpetrator may have made threats against the child(ren) if the victim of domestic violence should attempt to leave or the victim of domestic violence may feel the child(ren) is at greater risk in a different environment).

- Shifting the perpetrator's abuse from the child(ren) to the adult victim of domestic violence.
- Leaving child(ren) with others (outside the home) as a way to protect the child(ren)."

Educational neglect. Educational neglect does not fall within the definition of "child neglect" in the Child Protection Law. Children's Protective Services will not investigate a report alleging only a child's failure to attend school. Reports alleging other forms of child abuse or neglect and including nonattendance will be investigated, however. *DHS Services Manual*, CFP 712-6.

Religious exemptions under the Child Protection Law. MCL 722.634 states that a parent or guardian legitimately practicing his or her religious beliefs who thereby does not provide specified medical treatment for a child shall not be considered a negligent parent or guardian for that reason alone. Thus, it appears that failure to provide medical treatment on legitimate religious grounds does not constitute "negligent treatment" or "child neglect" under the Child Protection Law. See also MCL 722.127 (DHS rules governing child care organizations may not authorize or require medical examination, immunization, or treatment of any child whose parent objects on religious grounds).

However, MCL 722.634 does not preclude a court from ordering medical or nonmedical remedial services recognized by state law for a child whose health requires it, nor does it abrogate the responsibility of persons required to report suspected abuse or neglect.

Practice Note: Ordering Medical Services for a Child Over the Religious Objection of a Parent, by Honorable Donald S. Owens

The telephone rings. Sleepily you open your eyes, get out of bed and answer the phone, inwardly groaning as you see it is 2:00 a.m. The voice on the phone is that of a doctor from your local hospital informing you that a newborn baby needs an immediate blood transfusion due to an Rh incompatibility with his mother. The doctor tells you that the parents refuse to consent to the transfusion because of their religious belief. He adds that without a transfusion very soon, the baby will suffer brain damage and possibly death. What can you do? What should you do?

Medical neglect of a child is a basis for Family Court jurisdiction. MCL 712A.2(b). Some question, however, whether a parent's refusal to consent to medical treatment for a child constitutes medical neglect when the refusal is based on sincerely held religious beliefs. Historically, courts have had little difficulty finding medical neglect when the objection of the parent is based upon a religious belief which is the product of mental illness or a religion invented by the parent.

Much more difficult are objections to medical treatment which are based on religious beliefs held by generally recognized religious denominations. Some argue that if the parents' religious belief is sincere and they belong to a generally recognized religious denomination, a court has no business overruling their decision regarding medical care for their own children. Since medicine is not infallible, and physicians themselves often disagree, parents must often decide between competing advice of physicians as to what treatment is in the best interest of their children. This is not considered neglect unless the parents' decision was patently unreasonable and the child suffered, or could have suffered, serious harm as a result. The same analysis applies to parental decisions based on religious beliefs. If the child is not in danger of serious harm, most courts will respect the parents' decision. If, on the other hand, competent medical testimony establishes that the child suffers a significant risk of serious harm, courts will usually intervene to protect the child and order treatment over the religious objection of the parents.

Those who object to the court's authority to order medical treatment over the religious objection of the parents often cite MCL 722.127; MSA 25.358(27), a provision of the Child Care Organizations Act, which provides that: "Nothing in the rules adopted pursuant to this act shall authorize or require medical examination, immunization, or treatment for any child whose parent objects thereto on religious grounds." They may also cite MCL 722.634; MSA 25.248(14), a provision of the Child Protection Law, which provides that: "A parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian. This section shall not preclude a court from ordering the provision of medical services or nonmedical remedial services recognized by state law to a child where the child's health requires it nor does it abrogate the responsibility of a person required to report child abuse or neglect." Both of these provisions appear to protect the right of parents to object to medical treatment on religious grounds.

The provision of the Child Protection Law implies that such parental conduct does not constitute neglect, but the law does not prohibit the court from ordering treatment. How this could be done is not explained. The Family Court only has authority to enter orders regarding juveniles if the juvenile comes within the jurisdiction of the court. However, if the defined behavior is not neglectful, the child obviously does not come within the jurisdiction of the court, and the court has no authority to order treatment for that child. In fact, this proviso of the law does not use the term "neglect," but states that the parental refusal to consent to medical treatment is not "negligent." This is a term from tort law and not from child abuse and neglect law. Presumably, the Legislature meant "neglectful," although it is conceivable by using the term "negligent," the Legislature meant to protect the parents from a tort action by the child's estate, but still permit the Family Court to take jurisdiction on the basis of neglect.

To the extent both of these statutory provisions attempt to prevent the court from protecting children whose lives or health are in serious danger, I believe that they are unconstitutional denials of equal protection to children. In a case which did not involve denial of medical treatment, but involved other attempts

by the state to protect children, and which involved the religious convictions of their parents, the U.S. Supreme Court in *Prince v Commonwealth of Massachusetts*, 64 S Ct 438 (1944), states a rationale which is equally applicable to the situations we have been discussing: “Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they [the children] have reached the age of full and legal discretion when they can make the choice for themselves.” *Id.* at 444.

If you decide, based on the foregoing analysis, that you have the authority as a judge to override the sincerely held religious convictions of the parents in a particular case, how should you proceed? During court hours, a petition may be filed and a preliminary hearing held. Unfortunately, most of these cases arise after court hours. In those cases, some judges verbally authorize placement of a child in the hospital based on a report of suspected medical neglect of the child. Once the court takes custody of the child and orders placement in the hospital, the court then has authority and responsibility to provide whatever medical treatment is necessary for the child.

While this approach has merit, especially in areas where these cases are numerous, it never gives the parents their “day in court.” By the time a preliminary hearing or trial takes place, the issue is moot since the medical treatment has been already authorized and rendered. The approach I favor (and practice) is for the judge to conduct a preliminary hearing at the hospital. A protective services worker (if available) or a hospital employee can handwrite a petition requesting jurisdiction. The judge can then hold a preliminary hearing in a room in the hospital, at which time the petition can be read to the parents, the doctors can testify under oath regarding the need for the treatment, the parents can have an opportunity to state their position, and the judge can then decide whether to authorize the filing of the petition or, if that is deferred until counsel can be obtained, to authorize the placement of the child and approve the medical treatment requested. Of course, having attorneys present for the parents and child (and even the petitioner) is highly desirable, though is usually not practical during the middle of the night. After such a hearing, the judge can handwrite a preliminary order taking custody of the child, placing the child in the hospital and authorizing specified medical treatment for the child.

While I do not believe this approach is required by the law, it does give the parents an opportunity to be heard in the event the judge orders the medical treatment, and it gives the judge an opportunity to clearly assess the true need for, and the urgency of, the treatment. Sometimes, after such hearings, treatment can be delayed and may even become unnecessary. If you order medical treatment, a wise course might be to order the minimum treatment necessary to preserve the life or the health of the child, rather than giving carte blanche to the medical staff. I often require the physician to obtain my approval for each medical procedure as it becomes necessary. In emergency situations, the physician must make reasonable efforts for a certain amount of time—usually 15 minutes—to contact me before proceeding with the treatment. All of these types of orders are designed to minimize the medical treatment the child will receive over the objection of the parents.

It is my opinion that sincerely held parental religious beliefs should be given great weight by the court and that orders authorizing medical treatment should only be entered when absolutely necessary and only to the minimum extent required. Because of the emergency nature of most of these proceedings, it is not possible to have a trial before the medical treatment is ordered; a preliminary hearing is usually the most that can be accomplished.

If medical treatment is ordered over their religious objections, some parents remain angry, even after the child recovers. Most, however, are happy that their child is alive and that, because the judge was willing to take appropriate action, they did not have to violate their religious beliefs.

There is also an argument that MCL 722.634 provides a Family Court with the authority to order medical services for the child.

C. “Person Responsible for the Child’s Health or Welfare”

Under MCL 722.622(u)(i)–(ii), “person responsible for the child’s health or welfare” means the following:

- a parent;
- a legal guardian;
- a person 18 years of age or older who resides for any length of time in the same home in which the child resides, or, except when used in MCL 722.627(2)(e) or MCL 722.628(8),* “a nonparent adult”; or
- an owner, operator, volunteer, or employee of a licensed or registered child care organization, or a licensed or unlicensed adult foster care family or small group home as defined in MCL 400.703 of the Adult Foster Care Facility Licensing Act.

Persons who reside in the child’s home may include foster parents, live-in adult friends or siblings of a parent or foster parent, and live-in babysitters or housekeepers. *DHS Services Manual*, CFP 711-5.

A “**nonparent adult**” is a person 18 years old or older who, regardless of the person’s domicile, meets all of the following criteria in relation to a child:

- the person has substantial and regular contact with the child;
- the person has a close personal relationship with the child’s parent or with a “person responsible for the child’s health or welfare”; and
- the person is not the child’s parent or a person otherwise related to the child by blood or affinity to the third degree (i.e., is *not* the

*These exceptions limit a “nonparent adult’s” access to information on the DHS’s central registry and absolve the DHS from contacting a “nonparent adult” after interviewing the child at a school or other institution.

child's parent, grandparent, great-grandparent, brother, sister, aunt, uncle, niece, or nephew).

MCL 722.622(t)(i)–(iii).

A **“child care organization”** is defined in MCL 722.111(1)(a) and includes:

“ . . . a governmental or nongovernmental organization having as its principal function the receiving of minor children for care, maintenance, training, and supervision, notwithstanding that educational instruction may be given. Child care organization includes organizations commonly described as child caring institutions, child placing agencies, children's camps, child care centers, day care centers, nursery schools, parent cooperative preschools, foster homes, group homes, or day care homes. . . .”

A foster parent is a person responsible for his or her foster child's health or welfare. *Spikes v Banks*, 231 Mich App 341, 351 (1998).

A **“child caring institution”** is defined in MCL 722.111(1)(b) and includes:

“ . . . a child care facility that is organized for the purpose of receiving minor children for care, maintenance, and supervision, usually on a 24-hour basis, in buildings maintained by the child caring institution for that purpose, and operates throughout the year. . . . Child caring institution also includes institutions for mentally retarded or emotionally disturbed minor children.”

A **“child placing agency”** is defined in MCL 722.111(1)(c) and includes:

“ . . . a governmental organization or an agency organized . . . for the purpose of receiving children for placement in private family homes for foster care or for adoption. The function of a child placing agency may include investigating applicants for adoption and investigating and certifying foster family homes and foster family group homes as provided in this act. The function of a child placing agency may also include supervising children who are 16 or 17 years of age and who are living in unlicensed residences as provided in [MCL 722.115(4)].”

*See Sections 2.19, Note (definition of “substantiation”), and 2.7 (referral to law enforcement and regulatory agencies), below.

Effect of substantiated child abuse or neglect by a “person responsible for the child’s health or welfare.” Such persons or organizations may be subject to the loss of parental or custodial rights over the child if the abuse or neglect is “substantiated.” If the person suspected of abuse or neglect is not “responsible for the child’s health or welfare,” the DHS may be required to notify the prosecutor for investigation of possible criminal violations and the Department of Consumer and Industry Services for possible regulatory violations.*

If DHS finds by a preponderance of the evidence that a nonparent adult who lives outside the child’s home, an owner, operator, volunteer, or employee of a child care organization, or an employee of an adult foster care home in which a child is placed has abused or neglected a child, the perpetrator must be placed on DHS’s central registry. MCL 722.628d(4). This applies to licensed foster parents. *DHS Services Manual*, CFP 711-4, 718-7.

2.2 Mandatory Reports of Suspected Abuse or Neglect

*See Section 2.5, below, for discussion of “reasonable cause to suspect.”

If a person listed below has “reasonable cause to suspect”* that a child is being abused or neglected, he or she must report or cause to be reported to the DHS the suspected abuse or neglect. These “mandatory reporters” are:

- physicians;
- physician’s assistants;
- dentists;
- registered dental hygienists;
- medical examiners;
- nurses;
- persons licensed to provide emergency medical care;
- audiologists;
- psychologists;
- marriage and family therapists;
- licensed professional counselors;
- certified social workers;
- social workers;
- social work technicians;
- school administrators;

- school counselors or teachers;
- law enforcement officers;
- members of the clergy; and
- regulated child care providers.

MCL 722.623(1)(a). See also MCL 330.1707(5) (mental health professional must report suspected abuse or neglect as required by MCL 722.623) and MCL 750.411 (hospitals, pharmacies, and physicians must report injuries caused by violence or a weapon to local law enforcement officer).

DHS employees who are mandatory reporters. MCL 722.623(1)(b) requires certain DHS employees who have reasonable cause to suspect child abuse or neglect to report their suspicions to DHS CPS. The DHS employees required to report are:

- “(i) Eligibility specialist.
- “(ii) Family independence manager.
- “(iii) Family independence specialist.
- “(iv) Social services specialist.
- “(v) Social work specialist.
- “(vi) Social work specialist manager.
- “(vii) Welfare services specialist.”

Privileges do not excuse mandatory reports of suspected abuse or neglect. MCL 722.631 states that “[a]ny legally recognized privileged communication except that between attorney and client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication is abrogated and shall not constitute grounds for excusing a report otherwise required to be made or for excluding evidence* in a civil child protective proceeding resulting from a report made pursuant to [the Child Protection Law]. This section does not relieve a member of the clergy from reporting suspected child abuse or child neglect under [MCL 722.623] if that member of the clergy receives information concerning suspected child abuse or child neglect while acting in any other capacity listed under [MCL 722.623].”

*See Section 11.3 for a discussion of the abrogation of privileges during child protective proceedings.

Licensing or certification sanctions for failure to report. A social worker’s failure to report suspected child abuse or neglect may result in licensing or certification sanctions. In *Becker-Witt v Bd of Examiners of Social Workers*, 256 Mich App 358, 362–64 (2003), the Court of Appeals upheld an administrative law judge’s (ALJ) revocation of a social worker’s

professional license for failure to comply with MCL 722.623(1). The Court of Appeals found that the social worker had reasonable cause to suspect that her client was sexually abusing the client's child. The Court of Appeals agreed with the ALJ that the social worker's failure to comply with the Child Protection Law constituted both gross negligence and incompetence as defined in MCL 339.604(e) and (g) of the Occupational Code.

Notification of mandatory reporter. The DHS must notify the above-listed "mandatory reporters" upon completion of an investigation of the report. See MCL 722.628(13)(a)–(c) and (14).

2.3 Non-Mandatory Reports of Suspected Abuse or Neglect

In addition to the mandatory reporters listed in Section 2.2, immediately above, any person (usually a friend, neighbor, or relative), including a child, who has reasonable cause to suspect child abuse or neglect may report the matter to the DHS or a law enforcement agency. MCL 722.624. See also MCL 722.632 (Child Protection Law does not prohibit any person from reporting suspected abuse or neglect to law enforcement officials or the court).

2.4 Child Abuse Reports by Judges Under the Parental Rights Restoration Act

*The Parental Rights Restoration Act refers to the Probate Court. However, the Family Division has exclusive original jurisdiction over these cases. MCL 600.1021(1)(i).

The Parental Rights Restoration Act, MCL 722.901 et seq., provides that abortions may not be performed on minors without first obtaining the written consent of the minor and one of the parents or legal guardians of the minor. MCL 722.903(1). If the parent or legal guardian is not available or refuses to give his or her consent, or if the minor elects not to seek the consent of a parent or legal guardian, the minor may petition the Family Division of the Circuit Court* for a waiver of the parental consent requirement. MCL 722.903(2).

The Parental Rights Restoration Act requires judges to report all instances of suspected sexual abuse, and permits judges to report all instances of suspected child abuse.

When minor reveals that she is a victim of sexual abuse. Where a person under age 18 seeking waiver of parental consent for abortion reveals to the court that she is the victim of sexual abuse, and that her pregnancy is, or may be, the result of the sexual abuse, the court must immediately:

“(a) Report the suspected abuse to the [DHS] or a law enforcement agency pursuant to the child protection law.

...

“(b) Inform the minor that there are laws designed to protect her, including all of the following provisions of [the Juvenile Code]:

(i) That a law enforcement officer may without court order take the minor into temporary protective custody if, after investigation, the officer has reasonable grounds to conclude that the minor’s health, safety, or welfare would be endangered by leaving her in the custody of her parent or legal guardian.*

*See Section 3.1.

(ii) That the [Family Division] may, upon learning of the suspected sexual abuse, immediately hold a preliminary inquiry to determine whether a petition for court jurisdiction should be filed or whether other action should be taken.*

*See Sections 6.6–6.7.

(iii) That the [Family Division] shall appoint an attorney to represent the minor in protective proceedings.*

*See Section 7.5.

(iv) That after a petition has been filed, the [Family Division] may order that the minor be placed with someone other than her parent or legal guardian pending trial or further court order if such placement is necessary to avoid substantial risk to the minor’s life, physical health, or mental well-being.”* MCL 722.904(6)(a)–(b).

*See Chapter 8.

When judge suspects that minor is a victim of child abuse. Proceedings under the Parental Rights Restoration Act are to be completed with confidentiality. MCL 722.904(2). However, notwithstanding these confidentiality requirements, a Family Division judge is permitted (as a “non-mandatory” reporter) to report all instances of suspected child abuse. MCL 722.904(5).* The pregnancy of a child less than 12 years old constitutes “reasonable cause to suspect” child abuse or child neglect. MCL 722.623(8).

*See Section 2.3, above.

2.5 “Reasonable Cause to Suspect” Abuse or Neglect

In *People v Cavaiani*, 172 Mich App 706 (1988), the Court of Appeals helped to define the standard of suspicion necessary to trigger the reporting requirements of the Child Protection Law. In *Cavaiani*, a child-patient of the defendant-psychologist told defendant that her father had fondled her breasts. Defendant failed to report the alleged abuse and was prosecuted for this failure. The circuit court dismissed the case and held that the phrase “reasonable cause to suspect” abuse or neglect did not give fair notice of

what conduct is required by the statute and thus rendered the Child Protection Law “void for vagueness.” The Court of Appeals granted the prosecutor’s application for leave to appeal and reversed the circuit court:

“In this case, the circuit court suggested that defendant, in the course of exercising professional judgment, might have concluded that the information supplied to him indicating that the victim was being abused was inaccurate or some kind of fantasy. That hardly makes the statute vague or overbroad. Defendant had reasonable suspicion of child abuse, but concluded that his suspicions were not factually founded. With respect to the defendant’s legal obligations under [the Child Protection Law], it was not for him to make this determination, but for the responsible investigative agencies, such as the Department of Social Services [now the DHS], to make. *While defendant is free to decide that the victim’s allegations are untrue for purposes of rendering professional treatment, he is not free to arrogate to himself the right to foreclose the possibility of a legal investigation by the state.*” *Id.* at 715 (emphasis added).

See also *Williams v Coleman*, 194 Mich App 606, 616–17 (1992) (foster care workers who had reasonable cause to suspect the neglect of a child who was not under court jurisdiction were required to refer the case to CPS rather than determine the credibility of the information received). Thus, it appears that the standard is objective—whether a reasonable person would suspect abuse or neglect—rather than subjective—whether the reporter actually believed that the child has been abused.

Pregnancy and venereal disease. In addition, for purposes of the Child Protection Law, the following constitute “reasonable cause to suspect” that abuse or neglect of a child has occurred:

- the pregnancy of a child less than 12 years old, and
- the presence of venereal disease in a child between the ages of one month and 12 years.

MCL 722.623(8).

Presence of alcohol or controlled substance in newborn’s body. Similarly, a mandatory reporter who knows or has reasonable cause to suspect from the infant’s symptoms that a newborn infant has any amount of alcohol, a controlled substance, or a metabolite of a controlled substance in his or her body must report to the DHS, unless the substance is present due to treatment of the mother or newborn. MCL 722.623a. See *In re Baby X*, 97 Mich App 111, 113–16 (1980), discussed in Section 2.16(C), below.

“Reasonable cause to suspect” abuse or neglect and the Safe Delivery of Newborns Law. Under the Safe Delivery of Newborns Law, MCL 712.1 et seq., a parent may “surrender” a “newborn child” to an “emergency service provider,” who must take temporary custody of the child. MCL 712.3(1). The emergency service provider must then transfer the child to a hospital. MCL 712.5(1). A physician must examine the child. MCL 712.5(2).

“‘Surrender’ means to leave a newborn with an emergency service provider without expressing an intent to return for the newborn.” MCL 712.1(2)(m). MCL 712.1(2) defines “emergency service provider” as “a uniformed or otherwise identified employee or contractor of a fire department, hospital, or police station when such an individual is inside the premises and on duty.” MCL 712.1(2)(e). “‘Newborn’ means a child who a physician reasonably believes to be not more than 72 hours old.” MCL 712.1(2)(j).

The mandatory reporting requirements contained in MCL 722.623 of the Child Protection Law do not apply to a child surrendered to an emergency service provider pursuant to the Safe Delivery of Newborns Law. MCL 712.2(2). MCL 722.628(16) states that “[u]nless . . . MCL 712.5[] requires a physician to report to the [DHS], the surrender of a newborn in compliance with [the Safe Delivery of Newborns Law] is not reasonable cause to suspect child abuse or neglect and is not subject to the [reporting requirements in MCL 722.623].” However, if a physician who examines a child has reason to believe that the child has been abused or neglected or is not a newborn child, that physician must report those suspicions to DHS as required by MCL 722.623. MCL 712.5(2).

2.6 Time Requirements for Mandatory Reports of Suspected Abuse or Neglect

An oral report must be made immediately, and, within 72 hours of the oral report, a written report containing information listed in MCL 722.623(2) must be filed with the DHS. MCL 722.623(1)(a). The written report is then forwarded to the DHS in the county in which the child suspected of being abused or neglected is found. MCL 722.623(4).*

*DHS Form 3200 may be used to comply with the requirement of a written report.

2.7 Investigation and Referral Requirements

The DHS has an affirmative duty to investigate alleged abuse or neglect, to prevent further abuse, to safeguard and enhance the welfare of the child, and to preserve family life where possible. MCL 722.628(2).

Within 24 hours after receiving a report, the DHS must either commence its own investigation or refer the case to the prosecuting attorney. MCL 722.628(1) states in part:

“Within 24 hours after receiving a report made under this act, the department shall refer the report to the prosecuting attorney if the report meets the requirements of [MCL 722.623(6)] or shall commence an investigation of the child suspected of being abused or neglected. Within 24 hours after receiving a report whether from the reporting person or from the department under [MCL 722.623(6)], the local law enforcement agency shall refer the report to the department if the report meets the requirements of [MCL 722.623(7)] or shall commence an investigation of the child suspected of being abused or neglected.”

The DHS *Services Manual*, CFP 712-5, states that “[c]ommencing an investigation requires contact with someone other than the referring person within 24 hours” of receipt of a complaint to assess risk and determine agency response. Contact with other community agencies that might have information, or contact with others as suggested by the complaint itself, satisfy the statutory requirement for commencement of the investigation. The *Services Manual* notes that agency intake procedures alone do not satisfy the statutory requirement.

Referral to law enforcement agency or regulatory agency. MCL 722.623(6) requires the DHS to refer an allegation, written report, or results of an investigation to a local law enforcement agency and, in certain cases, a regulatory agency. That statutory provision states as follows:

“If an allegation, written report, or subsequent investigation of suspected child abuse or child neglect indicates a violation of [MCL 750.136b (criminal child abuse), MCL 750.145c (child sexually abusive material or activity), or MCL 750.520b–750.520g (criminal sexual conduct)], has occurred, or if the allegation, written report, or subsequent investigation indicates that the suspected child abuse or child neglect was committed by an individual who is not a person responsible for the child’s health or welfare, including, but not limited to, a member of the clergy, a teacher, or a teacher’s aide, the department shall transmit a copy of the allegation or written report and the results of any investigation to a law enforcement agency in the county in which the incident occurred. If an allegation, written report, or subsequent investigation indicates that the individual who committed the suspected abuse or neglect is a child care provider and the department believes that the report has basis in fact, the department shall transmit a copy of the written report or the results of the investigation to the child care regulatory agency with authority over the child

care provider's child care organization or adult foster care location authorized to care for a child."

Prosecutor's right to bring both child protection and criminal charges against parents. A jury verdict of "no jurisdiction" in a child protective proceeding does not bar, on collateral estoppel grounds, a subsequent criminal prosecution, since a jury could find that the child was not within the jurisdiction of the court even though it may have also found that a criminal offense occurred. *People v Gates*, 434 Mich 146, 159–60 (1990). In *Gates*, the Michigan Supreme Court stated that the jury may have concluded that although the defendant was guilty of criminal sexual conduct involving his child, that conduct did not render the child's home environment unfit under MCL 712A.2(b)(2). Thus, the prosecutor need not elect between filing a petition for Family Division jurisdiction in protective proceedings and initiating criminal proceedings. *Gates, supra* at 163.*

*See also Section 11.1, which contains a discussion of the privilege against self-incrimination.

Referral to DHS. MCL 722.623(7) requires a local law enforcement agency to refer an allegation or written report to DHS for further investigation and, in certain circumstances, to a regulatory agency. That statutory provision states as follows:

"If a local law enforcement agency receives an allegation or written report of suspected child abuse or child neglect and the allegation, written report, or subsequent investigation indicates that the child abuse or child neglect was committed by a person responsible for the child's health or welfare, the local law enforcement agency shall refer the allegation or provide a copy of the written report and the results of any investigation to the county family independence agency of the county in which the abused or neglected child is found, as required by subsection (1)(a). If an allegation, written report, or subsequent investigation indicates that the individual who committed the suspected abuse or neglect is a child care provider and the local law enforcement agency believes that the report has basis in fact, the local law enforcement agency shall transmit a copy of the written report or the results of the investigation to the child care regulatory agency with authority over the child care provider's child care organization or adult foster care location authorized to care for a child. Nothing in this subsection or subsection (1) shall be construed to relieve the department of its responsibilities to investigate reports of suspected child abuse or child neglect under this act."

Notifying the child's parent or legal guardian. If the child is not in the physical custody of the parent or legal guardian and informing the parent or legal guardian would not endanger the child's health or welfare, the law

enforcement agency or DHS shall inform the parent or legal guardian of the investigation as soon as the parent's or legal guardian's identity is discovered. MCL 722.628(1).

When the DHS interviews a person concerning alleged abuse or neglect, the DHS is required to provide that person with specific information. MCL 722.628(2), in relevant part, states:

“In the course of an investigation, at the time that a department investigator contacts an individual about whom a report has been made under this act or contacts an individual responsible for the health or welfare of a child about whom a report has been made under this act, the department investigator shall advise that individual of the department investigator's name, whom the department investigator represents, and the specific complaints or allegations made against the individual. The department shall ensure that its policies, procedures, and administrative rules ensure compliance with the provisions of this act.”

*See Section 2.1(C), above, for the definition of “child care organization.”

Referring reports of suspected abuse or neglect or results of an investigation. As noted above, MCL 722.623(6) and (7) require the DHS and local law enforcement agencies to send a child care regulatory agency copies of the written report of suspected child abuse or neglect when the suspected perpetrator is a child care provider. “Child care regulatory agency” means the Department of Consumer and Industry Services. MCL 722.622(i). A “child care provider” is “an owner, operator, employee, or volunteer of a child care organization* or of an adult foster care location authorized to care for a child.” MCL 722.622(h). In some cases, a child may be placed in an “adult foster care family home” or “adult foster care small group home,” as those terms are defined in MCL 400.703. See MCL 722.115(6) and (8).

Investigations by other entities. The Child Protection Law does not preclude or hinder a hospital, school, or other institution from conducting its own investigation of a reported claim, or from taking disciplinary action against employees based on its own investigation. See MCL 722.632a. Moreover, if there is reasonable cause to suspect the abuse or neglect of a child under the care or control of a public or private agency, institution, or facility, the investigation must be conducted by an agency independent of the agency, institution, or facility being investigated. If the investigation produces evidence of a violation of MCL 750.136b (criminal child abuse), MCL 750.145c (child sexually abusive material or activity), or MCL 750.520b–750.520g (criminal sexual conduct), the investigating agency must notify the local law enforcement agency of the results of the investigation. MCL 722.628(7).

2.8 Required Cooperation Between DHS and Law Enforcement Officials

Within 24 hours of becoming aware of one or more of the following conditions, the DHS must seek the assistance of, and cooperate with, law enforcement officials:

“(a) Abuse or neglect is the suspected cause of a child’s death.

“(b) The child is the victim of suspected sexual abuse or sexual exploitation.*

“(c) Abuse or neglect resulting in severe physical injury to the child requires medical treatment or hospitalization.

...

“(d) Law enforcement intervention is necessary for the protection of the child, a department employee, or another person involved in the investigation.

“(e) The alleged perpetrator of the child’s injury is not a person responsible for the child’s health or welfare.*
MCL 722.628(3)(a)–(e).

*See Section 2.1(A), above, for definitions of these terms.

*See Section 2.1(C), above, for a definition of this term.

The involvement of law enforcement officials in an investigation does not prevent or relieve the DHS from proceeding with its investigation if there is reasonable cause to suspect that the abuse or neglect was committed by a person responsible for the child’s health or welfare. MCL 722.628(5).

2.9 Required Use of Protocols

If a “central registry case” involves a child’s death, serious physical injury, or sexual abuse or exploitation, the DHS must refer the case to the prosecuting attorney for the county in which the child is located. The prosecuting attorney must review the case to determine whether the investigation complied with the required protocol. MCL 722.628b. A “central registry case” means a case that the DHS classifies as Category I or Category II. For cases investigated before July 1, 1999, a “central registry case” means a case involving a “substantiated” allegation of abuse or neglect. See MCL 722.622(d).*

*See Section 2.19, below, for a detailed discussion of the required classification of all allegations of child abuse and neglect.

MCL 722.627b provides for the establishment of standing child fatality review teams. In addition, in each county, the prosecuting attorney and DHS are required to develop and establish procedures for involving law enforcement in investigations. In each county, the prosecuting attorney and DHS are required to adopt and implement a standard child abuse and neglect

investigation and interview protocol using as models the protocols developed by the Governor’s Task Force on Children’s Justice as published in DHS Publication 794 (revised 8–98) (A Model Child Abuse Protocol: Coordinated Investigative Team Approach) and DHS Publication 779 (8–98) (the Forensic Interviewing Protocol), or an updated version of these publications. MCL 722.628(6).

A forensic interviewing protocol must be used when interviewing a child during a CPS investigation. DHS *Services Manual*, CFP 713-3.

2.10 Using Videorecorded Statements

*See Section 11.8(B) for the definition of “developmentally disabled.”

An employee of DHS, an investigating law enforcement agency, a prosecuting attorney or assistant attorney general, or another person designated to do so under a county protocol established under MCL 722.628 may take a child’s videorecorded statement. MCL 712A.17b(1)(a) and (c). The child must be under 16 years of age or over age 16 and developmentally disabled. MCL 712A.17b(1)(d).*

MCL 712A.17b(5)–(6) state as follows:

*A “custodian of the videorecorded statement” means one of the persons listed in the paragraph above who may take a videorecorded statement. MCL 712A.17b(1)(a).

“(5) A custodian of the videorecorded statement* may take a witness’s videorecorded statement. The videorecorded statement shall be admitted at all proceedings except the adjudication stage instead of the live testimony of the witness. The videorecorded statement shall state the date and time that the statement was taken; shall identify the persons present in the room and state whether they were present for the entire videorecording or only a portion of the videorecording; and shall show a time clock that is running during the taking of the statement.

“(6) In a videorecorded statement, the questioning of the witness should be full and complete; shall be in accordance with the forensic interview protocol implemented as required by . . . MCL 722.628; and, if appropriate for the witness’s developmental level, shall include, but need not be limited to, all of the following areas:

- (a) The time and date of the alleged offense or offenses.
- (b) The location and area of the alleged offense or offenses.
- (c) The relationship, if any, between the witness and the respondent.

(d) The details of the offense or offenses.

(e) The names of other persons known to the witness who may have personal knowledge of the offense or offenses.”

At a reasonable time before a videorecorded statement is offered into evidence, each respondent and his or her attorney has a right to view and hear the statement. In addition, a court may make a copy of a videorecorded statement available to a respondent’s attorney. MCL 712A.17b(7).

To protect a child’s privacy, a court may enter a protective order regarding a videorecorded statement that has become part of a court record. MCL 712A.17b(10). A videorecorded statement is not discoverable under the Michigan Court Rules governing discovery. MCL 712A.17b(11). However, a transcript of a videorecorded statement may be released.

MCL 712A.17b(7) deals with the release of a videorecorded statement to other entities for use in a criminal prosecution. That provision states as follows:

“A custodian of the videorecorded statement may release or consent to the release or use of a videorecorded statement or copies of a videorecorded statement to a law enforcement agency, an agency authorized to prosecute the criminal case to which the videorecorded statement relates, or an entity that is part of county protocols established under . . . MCL 722.628. Each respondent and, if represented, his or her attorney has the right to view and hear the videorecorded statement at a reasonable time before it is offered into evidence. In preparation for a court proceeding and under protective conditions, including, but not limited to, a prohibition on the copying, release, display, or circulation of the videorecorded statement, the court may order that a copy of the videorecorded statement be given to the defense.”

2.11 Investigation and Custody Requirements When a Child Is Brought to a Hospital

If a child suspected of being abused or neglected is brought to a hospital for outpatient services or admitted to a hospital and the attending physician determines that releasing the child would endanger the child’s health or welfare, the attending physician must notify his or her supervisor and the DHS. The supervisor may detain the child in protective custody until the next regular business day of the Family Division. The Family Division must then:

*See Section 3.4.

- order the child detained in the hospital;
- order the child detained as required by MCL 712A.14,* or
- order the child to be released to the child’s parent, guardian, or custodian.

MCL 722.626(1).

*See Section 2.14, below.

In such cases, physicians have a statutory duty to make the necessary examinations and submit a written report to the DHS. MCL 722.626(2). This report must be provided to the DHS even without parental consent or release. OAG, 1978, No 5406, p 724 (December 15, 1978). If a report is made by a person other than a physician, or if the physician’s report is incomplete, the DHS may request a court-ordered medical evaluation of the child.* If the child’s health is seriously endangered and a court order cannot be obtained, the DHS shall have an evaluation performed without a court order. MCL 722.626(3).

In *Lavey v Mills*, 248 Mich App 244, 255–56 (2001), a police officer and CPS worker were held to have violated MCL 722.626(3), where the police officer instructed a school principal to transport a child to a doctor’s office, and a CPS worker signed a consent form authorizing a gynecological examination of the child. Neither the police officer nor the CPS worker sought a court order or search warrant, and the examination took place on a weekday during regular business hours, when the court was open. There was no evidence that the child’s health was seriously endangered.

Note: The court, a child placing agency, or the DHS may consent to routine, nonsurgical medical care, or emergency medical and surgical treatment *if the minor is placed outside the home*. MCL 722.124a(1). See Section 3.7 for a discussion of the requirements for ordering medical treatment for a child.

2.12 Required Procedures for Contacting a Child at School

*The DHS is not required to notify a “nonparent adult” in these cases. See Section 2.1(C), above.

A school or other institution must cooperate with the DHS during an investigation of suspected abuse or neglect. If the DHS determines that it is necessary to complete the investigation or prevent abuse or neglect, schools and other institutions must allow access to the child without parental consent. The DHS must notify the person responsible for the child’s welfare after contact with the child and may delay notice if it would compromise the child’s or child’s sibling’s safety or the integrity of the investigation. MCL 722.628(8).*

A school administration may not impose conditions upon a CPS worker’s interview of a child at school. The school may not deny access to a child, require that the CPS worker establish in writing the need to interview the

child, require that a school employee be present during the interview, or require parental consent before allowing access to the child. OAG, 1995, No 6869, p 92 (September 6, 1995).

Before and after contact with the child at school, the DHS investigator must meet with a designated school staff person to review investigation procedures, formulate a course of action based on the contact with the child, and share information, within the confidentiality provisions of the Child Protection Law. MCL 722.628(9)(a)–(b).*

*See Sections 2.16(B) (DHS access to educational records) and 2.18 (access by public to DHS's central registry), below.

Unless the DHS has obtained a court order,* a child shall not be subjected to a search at a school that requires the child to remove his or her clothing to expose his buttocks or genitalia, or her breasts, buttocks, or genitalia. MCL 722.628(10).

*See Section 2.14, below.

2.13 Interviewing a Child Out of the Presence of a Suspected Abuser

During the investigation of suspected abuse or neglect, the child shall not be interviewed in the presence of a suspected abuser. MCL 722.628c.

2.14 The Use of Court Orders in Investigating Suspected Abuse or Neglect

After a petition is filed initiating child protective proceedings, the court may make orders to further investigate the allegations of abuse or neglect. MCR 3.961(A) states that “[a]bsent exigent circumstances, a request for court action to protect a child must be in the form of a petition.” In exigent circumstances, such a request for court action need not be in writing but may be via telephone.*

*See Section 2.15(B), below (constitutional limitations on investigations) and 3.1–3.2.

MCL 712A.12 provides that after a petition has been filed, the court may order further investigation, including examination of the child by a physician, dentist, psychologist, or psychiatrist. MCR 3.923(B) more broadly provides for such an examination of a minor, parent, guardian, or legal custodian, and this court rule does not require the filing of a petition prior to the court's order. MCR 3.923(C) gives the court the authority to order photographing of a minor concerning whom a petition has been filed.

2.15 Constitutional Requirements for Reporting and Investigating Suspected Child Abuse or Neglect

This section discusses the constitutional requirements applicable to reporting and investigating suspected child abuse or neglect. It sets forth these requirements as applicable to mandatory reporting, investigations by CPS, and cooperative or joint investigations by CPS and law enforcement agencies. For discussion of motions to suppress evidence, see Section 9.3.

A. Reporting Suspected Child Abuse or Neglect

Search and seizure, privilege against self-incrimination, and mandatory reporting. The Michigan Court of Appeals has determined that the Fourth Amendment is not implicated by the mandatory reporting statute. In *People v Cavaiani*, 172 Mich App 706, 716 (1988), a psychologist in private practice was prosecuted for failing to report. He argued that the mandatory reporting law violated his and his client's Fourth Amendment rights to be free of unreasonable searches and seizures of oral evidence. Because no governmental intrusion into the therapeutic session was involved, the Fourth Amendment was not implicated. The Court of Appeals also rejected the defendant's argument that the mandatory reporting statute violated his and his patients' Fifth Amendment privilege against self-incrimination. The Court found that the defendant lacked standing to assert the privilege on behalf of a patient who had incriminated himself or herself in therapy. Moreover, because no governmental coercion was involved, the patient's decision to speak was entirely voluntary.

Following *Cavaiani*, however, the Court of Appeals found sufficient state action to invoke the due process clauses of the state and federal constitutions, where a counselor employed by a private agency made a report pursuant to the mandatory reporting statute. In *People v Farrow*, 183 Mich App 436, 440 (1990), the Court found a "sufficiently close nexus between the state and the challenged action so that the acts may be fairly treated as those of the state itself." *Id.* at 441, citing *Jackson v Metropolitan Edison Co*, 419 US 345, 351 (1974), and *Cole v Dow Chemical Co*, 112 Mich App 198, 203 (1982). Because the mandatory reporting statute compelled a private party to report suspected abuse, the state could be held responsible for the private party's act of reporting the suspected abuse. "'When the state has commanded a particular result, it has saved to itself the power to determine that result and thereby 'to a significant extent' has 'become involved' in it.'" *Farrow, supra* at 442-43, relying on *Adickes v S H Kress & Co*, 398 US 144, 170 (1970), quoting *Peterson v City of Greenville*, 373 US 244, 248 (1963).

Despite the finding of state action when a party reports to the DHS pursuant to the mandatory reporting law, the Court of Appeals subsequently refused to reverse a criminal conviction obtained following a report by a private counselor. In *People v Mineau*, 194 Mich App 244, 248-49 (1992), the defendant sought counseling regarding the sexual conduct underlying the

charge and was informed that his treatment would remain confidential. The counseling agency subsequently reported the conduct under the mandatory reporting statute. The defendant pled guilty to second-degree criminal sexual conduct. On appeal, he argued that, when applied to the facts of his case, the mandatory reporting requirement violated notions of “fundamental fairness” underlying due process requirements. In rejecting this argument, the Court of Appeals noted that the mandatory reporting law manifested the Legislature’s choice of probable criminal prosecution over self-reporting and self-treatment:

“Given enactment of the reporting requirement, as well as the section abrogating any legally recognized privileged communications except those between attorney and client, MCL 722.631; MSA 25.248(11),* it appears the Legislature found the public policy arguments supporting general detention [sic], and thus likely prosecution, MCL 722.623; MSA 25.248(3), more compelling than those promoting self-reporting and self-sought treatment.” *Mineau, supra* at 248.

*MCL 722.631 was amended in 2002 to preserve the priest-penitent privilege as well. See 2002 PA 693.

See also *Cavaiani, supra* at 716-17, where the Court recognized that the mandatory reporting requirements might dissuade persons from seeking treatment due to the risk of criminal prosecution but found no coercive activity by the state sufficient to bring the Fifth Amendment privilege against self-incrimination into play.

In *People v Perlos*, 436 Mich 305, 325 (1990), the Michigan Supreme Court cited Michigan’s mandatory reporting statute in upholding a provision of Michigan’s motor vehicle code that required hospital personnel to disclose to the prosecuting attorney upon request the results of blood-alcohol tests performed on persons involved in accidents. The prosecutor did not obtain a search warrant to get the test results, nor did the defendants consent to release of the results. The Court found no violation of the Fourth Amendment or Const 1963, art 1, § 11. The search was the removal of a blood sample, which was done for medical rather than law enforcement purposes, even though a statute required notification of the prosecutor when an illegal blood-alcohol level was detected. “The ‘search’ performed here, i.e., the removal of the blood sample from defendant, was done strictly for purposes of medical treatment and not at the direction of the police, the prosecutor, or state agents. Thus, the actual removal of the blood sample is not a search protected by the Fourth Amendment, since state action is not involved.” *Perlos, supra* at 315. As to turning over the test results, the Court found that the defendants did not have a reasonable expectation of privacy in the results. By enacting the statute in question, the Legislature limited the physician-patient privilege, thus indicating that drivers do not have an expectation of privacy in the records that society is willing to recognize as reasonable. *Id.* at 318.

B. Investigating Suspected Child Abuse or Neglect

A lack of binding precedent leaves the precise constitutional standards that apply to investigations in child abuse and neglect cases unclear. Reference to cases from other jurisdictions provides guidance, however. For a complete summary of Fourth Amendment considerations for child protective workers conducting child abuse investigations, see Hardin, *Legal barriers in child abuse investigations: state powers and individual rights*, 63 Wash L R 493 (1988). For considerations in criminal child abuse and neglect investigations, see Gallagher, “*The right of the people . . .*” *The exclusionary rule in child abuse litigation*, 4 T M Cooley J Prac & Clinical L 1, 18 (2000) (“Contact between child abuse investigators and families takes many forms. Some are relatively unobtrusive, such as a school nurse discussing a child’s bruises with a willing family. Others, which may involve social workers accompanied by police forcibly entering a family’s home are obviously more invasive, and are scrutinized more heavily by the courts. The level of intrusion can occur almost anywhere on this continuum.”) (Footnotes omitted.)

MCL 722.628(17) requires that all DHS employees involved in investigating child abuse or neglect cases be trained in “the legal duties to protect the state and federal constitutional and statutory rights of children and families from the initial contact of an investigation through the time services are provided.”

Miranda warnings. In *People v Porterfield*, 166 Mich App 562 (1988), the Court of Appeals held that the defendant’s statement made to a CPS worker in the course of an investigation was admissible in a criminal prosecution. Although the defendant had been bound over for trial at the time of the statement, the CPS worker obtained defense counsel’s consent to interview the defendant. The Court stated that “although the caseworker was a state employee, she was not charged with enforcement of criminal laws and she was not acting at the behest of the police; therefore, she need not have advised defendant of his *Miranda* rights.” *Id.* at 567, citing *Impens, infra*.

Searches and seizures. The Fourth Amendment to the United States Constitution states:

“The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The parallel provision in Michigan’s constitution, Const 1963, art 1, §11, is substantially similar to the federal provision. The Michigan Supreme Court will only depart from the United States Supreme Court’s construction of the

Fourth Amendment for “compelling reasons.” *People v Nash*, 418 Mich 196, 214 (1983).

As a general rule in the criminal context, either a proper search warrant supported by probable cause, a consent to a search that is freely and voluntarily given, probable cause to conduct a warrantless search, or an emergency justifying a warrantless search is required for a constitutional search and seizure. “[T]he Fourth Amendment is applicable to the activities of civil as well as criminal authorities.” *New Jersey v TLO*, 469 US 325, 351 (1985). However, because constitutional protections apply only to governmental actions, if a private institution or person is involved in an investigation, it must be determined whether the institution or person was “acting in concert with or at the request of police authority.” *Grand Rapids v Impens*, 414 Mich 667, 673 (1982), quoting *People v Omell*, 15 Mich App 154, 157 (1968). The remedy for unlawful conduct by non-governmental actors is a civil suit for monetary damages rather than exclusion of evidence. *Impens*, *supra* at 673-74. See also *People v Mineau*, 194 Mich App 244, 248-49 (1992) (sole remedy for violations of mandatory reporting law is the civil liability set forth in that statute; immunity from prosecution is not an appropriate remedy).

A search warrant may be obtained according to law in a criminal investigation. In *People v Wood*, 447 Mich 80, 84–85 (1994), the Michigan Supreme Court held that the social worker-client privilege was not violated where the defendant’s daughter told the social worker that her parents were selling and using drugs in the home, and where the social worker subsequently acted as affiant for a search warrant for the home.

Investigative home visits. In *Wyman v James*, 400 US 309 (1971), the United States Supreme Court found that home visits by social workers, which were a prerequisite to maintaining benefits under the Aid to Families with Dependent Children program, were not searches under the Fourth Amendment. The Court stated that although “the caseworker’s posture in the home visit is perhaps, in a sense, both rehabilitative and investigative . . . , [the home visit cannot] be equated with a search in the traditional criminal law context.” *Wyman*, *supra* at 317.

However, the home visit in *Wyman* was not forced or coerced. *Id.*, distinguishing *Camara v Municipal Court*, 387 US 523 (1967). Investigative home visits by child protection caseworkers have been analogized to the administrative searches at issue in *Camara*. *Camara* holds that absent consent or a warrant, entry of a building to conduct a search for violations of administrative regulations is unconstitutional. *Camara*, *supra*, 387 US at 534, 539-40. See also *Michigan v Taylor*, 436 US 499, 506 (1978) (“Searches for administrative purposes, like searches for evidence of crime, are encompassed by the Fourth Amendment”). Searches and seizures in investigations of suspected child abuse or neglect may occur during investigative entries into the child’s home, which may be “coerced” through the presence of a police officer. See *Calabretta v Floyd*, 189 F3d 808, 813-

14 (CA 9, 1999), and *Walsh v Erie County Dep't of Job and Family Services*, 240 F Supp 2d 731, 744 (ND Ohio, 2003) (because investigations of suspected child abuse or neglect differ from the searches at issue in *Wyman*, *supra* and are quasi-criminal, the Fourth Amendment applies). By itself, entering the home to investigate suspected child abuse or neglect is undoubtedly more intrusive than the visit in *Wyman* and has been held to constitute a search. *Calabretta*, *supra*. As in the criminal law context, a search warrant supported by probable cause, consent, or emergency circumstances is required before entering a residence to investigate suspected child abuse or neglect. *Good v Dauphin County Social Services*, 891 F2d 1087, 1092 (CA 3, 1989). An anonymous tip alleging that a child has been physically injured has been deemed insufficient to establish probable cause. *Id.*

Free and voluntary consent to warrantless search. One exception to the general probable cause and warrant requirements is a search conducted pursuant to a valid consent. *Schneekloth v Bustamonte*, 412 US 218, 219 (1973). To be valid in a criminal context, consent must be unequivocal and specific, and freely and intelligently given. *People v Kaigler*, 368 Mich 281, 294 (1962). Because a consent to search involves the waiver of a constitutional right, the prosecutor cannot discharge this burden by showing a mere acquiescence to a claim of lawful authority. *Bumper v North Carolina*, 391 US 543, 548–49 (1968). Police officers need not inform persons of their right to refuse consent. *Ohio v Robinette*, 519 US 33, 39–40 (1996). To determine whether consent was freely and voluntarily given rather than a product of police coercion, a court must examine the totality of the circumstances surrounding the consent, including the characteristics of the person who consented. *Id.*, 412 US at 226–27, and *People v Reed*, 393 Mich 342, 362–63 (1975). Age, maturity, and educational level may be considered in determining the voluntariness of the consent to search. *United States v Mayes*, 552 F2d 729, 732–33 (CA 6, 1977), and *In re JM*, 619 A2d 497, 502 (DC App, 1992) (14-year-old suspect's age and maturity "critical" to the validity of his consent to frisk of his person). "There is no Fourth Amendment violation where police officers conduct a search pursuant to the consent of a third party whom the officers reasonably believe to have common authority over the premises." *People v Goforth*, 222 Mich App 306, 315 (1997), citing *People v Grady*, 193 Mich App 721, 724 (1992).

Taking a child into protective custody. As noted above, in the criminal context, a warrant supported by probable cause, a valid consent to search, or emergency circumstances are required before entering a residence. In child protective proceedings, a court order is the equivalent of a search warrant. *Tennenbaum v Williams*, 193 F3d 581, 602 (CA 2, 1999). MCR 3.963(B)(1) gives the court authority to order an officer or other person to take a child into custody. That rule states as follows:

"The court may order an officer or other person to immediately take a child into protective custody when, after presentment to the court of a petition, a judge or

referee has reasonable grounds to believe that conditions or surroundings under which the child is found are such as would endanger the health, safety, or welfare of the child and that remaining in the home would be contrary to the welfare of the child. The court may also include in such an order authorization to enter specified premises to remove the child.”

Under state law, law enforcement officials may be required to accompany CPS workers when a child is actually removed from the home if no court order has been obtained. “An officer may without court order remove a child from the child’s surroundings and take the child into protective custody if, after investigation, the officer has reasonable grounds to conclude that the health, safety, or welfare of the child is endangered.” MCR 3.963(A). See also MCL 712A.14(1). A probable-cause determination need not be made prior to the temporary removal and placement of a child pending investigation and preliminary hearing. *In re Albring*, 160 Mich App 750, 756–57 (1987). An “officer” is “a government official with the power to arrest or any other person designated and directed by the court to apprehend, detain, or place a minor.” MCR 3.903(A)(16). This definition does not include a CPS worker who does not have a court order. See also MCL 712A.14(1) (local or state police officer, sheriff or deputy sheriff, or probation officer or county agent may take children into custody without court order).

The “emergency circumstances” doctrine allows police, as part of their community caretaking function, to enter a residence if police reasonably believe that a person inside is in need of immediate aid. *People v Davis*, 442 Mich 1, 11 (1993). In *Walsh v Erie County Dep’t of Job and Family Services*, 240 F Supp 2d 731, 748–50 (ND Ohio, 2003), an anonymous caller reported that the house was cluttered and overcrowded, and the children were in poor health and developmentally disabled. During an investigative visit by a social worker and police officer, the family attempted to leave their residence after refusing the investigators entry into the house. The Court found these circumstances insufficient to dispense with the warrant requirement under the “emergency circumstances” doctrine.

Visual inspection of child’s body. The visual inspection of the parts of a child’s body normally covered by clothing implicates the Fourth Amendment. *Daryl H v Coler*, 801 F2d 893, 899-900 (CA 7, 1986). Warrantless strip searches of children conducted by police or in which the police participated have been held to be unreasonable under the Fourth Amendment. *Good v Dauphin County Social Services*, 891 F2d 1087, 1092 (CA 3, 1989) (police officer and social worker claimed that no warrant was necessary prior to strip search), and *Franz v Lytle*, 997 F2d 784, 792 (CA 10, 1993) (police officer acting alone). In *Daryl H*, *supra*, the social workers who conducted the search were acting according to policy guidelines regarding strip searches, and the court held that although the warrant and

probable cause requirements were inapplicable, issues of fact regarding whether the guidelines were reasonable under the Fourth Amendment precluded summary judgment on the social worker's qualified immunity claim.

*See Section 2.11 for required procedures under Michigan law.

Medical examinations. A medical examination undertaken at the request of a child protective caseworker is a search for Fourth Amendment purposes. *Tennenbaum v Williams*, 193 F3d 581, 605–06 (CA 2, 1999). The warrant and probable cause or emergency circumstances requirements apply to such medical examinations. *Id.* at 606.*

C. Cooperative and Joint Investigations of Suspected Child Abuse or Neglect

*See Sections 2.7–2.8, above.

Cooperative investigations of suspected abuse or neglect. By statute in Michigan, the DHS and law enforcement officials are required to cooperate during investigations of suspected child abuse or neglect. MCL 722.628(2)–(4). In addition, DHS is required to refer complaints that include Penal Code violations to the prosecuting attorney. MCL 722.623(6).*

Pursuant to MCL 722.628(2), the DHS must cooperate with law enforcement officials and others in the course of its investigation, and must “take necessary action to prevent further abuses, to safeguard and enhance the child’s welfare, and to preserve family life where possible.” In *People v Wood*, 447 Mich 80, 82–84 (1994), a child informed her school principal that her parents were selling drugs from their home. The principal reported the allegations to DHS, and a CPS worker investigated. The social worker also served as an affiant for a search warrant to search the home. Drugs were seized, and the parents moved to suppress the items seized. The Michigan Supreme Court found that the social worker was required to cooperate with law enforcement officials pursuant to MCL 722.628 because it was necessary to “safeguard and enhance the welfare of the child.” *Wood, supra* at 86. The Court held “that the trial court correctly concluded that obtaining a search warrant for the defendant’s home was necessary in this case for the protection of the children.” *Id.* at 87. The cooperation between law enforcement and the CPS worker did not undermine the legality of the seizure and use of the evidence in the subsequent criminal trial. *Id.* at 88–89.

*See Sections 2.9–2.10, above.

Joint investigations pursuant to a local protocol. The DHS and prosecuting attorney in each county “shall develop and establish procedures for involving law enforcement officials” in child abuse and neglect investigations. MCL 722.628(6). The DHS and prosecutor in each county must adopt standard investigation and forensic interviewing protocols.*

The “special needs” doctrine and joint investigations. An exception to the warrant and probable-cause requirements, the “special needs” doctrine allows the reasonableness of a search and seizure to be determined by “a careful balancing of governmental and private interests . . . in those exceptional circumstances in which special needs, beyond the normal need

for law enforcement, make the warrant and probable-cause requirement impracticable” *New Jersey v TLO*, 469 US 325, 351 (1985). See also *Skinner v Railway Labor Executives’ Ass’n*, 489 US 602 (1989), *National Treasury Employees Union v Von Raab*, 489 US 656 (1989), *Vernonia School Dist 47J v Acton*, 515 US 646 (1995), and *Chandler v Miller*, 520 US 305 (1997). The application of the “special needs” doctrine to child abuse or neglect investigations has not been conclusively decided. See *Tennenbaum v Williams*, 193 F3d 581, 603-04 (CA 2, 1999), and cases collected therein. The United States Court of Appeals for the Sixth Circuit has found unconstitutional a Michigan statute authorizing suspicionless drug testing of welfare recipients. *Marchwinski v Howard*, 113 F Supp 2d 1134 (ED Mich, 2000), rev’d 309 F3d 330 (CA 6, 2002), rehearing gtd 319 F3d 258 (CA 6, 2003), aff’d en banc 60 Fed Appx 601 (CA 6, 2003). The state argued that the random drug tests fulfilled the “special need” of preventing child abuse, citing a correlation between child abuse and substance abuse. The District Court found that the state could not rely on such a correlation since the government assistance programs at issue were not designed to ameliorate child abuse. *Id.* 113 F Supp 2d at 1141-43.

In *Ferguson v City of Charleston*, 532 US 67 (2001), the United States Supreme Court found that a state hospital’s policy of testing pregnant women for illegal drug use and reporting positive results to police violated the Fourth Amendment prohibition against unreasonable searches and seizures. Because the police participated in the creation of the policy, hospital employees conducting the tests became in effect agents of law enforcement, and Fourth Amendment requirements therefore applied to the tests.

The United States Supreme Court first found that the urine tests were administered by “state actors” and were searches within the meaning of the Fourth Amendment. *Id.*, 532 US at 76. The Court then found that the instant case did not fall under the “special needs” doctrine. The “special need” asserted in *Ferguson* to justify the warrantless search was insufficiently divorced from the state’s general interest in law enforcement. “In this case, . . . the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment. This fact distinguishes this case from circumstances in which physicians or psychologists, in the course of ordinary medical procedures aimed at helping the patient herself, come across information that under rules of law or ethics is subject to reporting requirements, which no one has challenged here.” *Ferguson, supra*, 532 US at 80–81. Although the ultimate goal of the policy was to treat the women’s substance abuse, “the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal.” *Id.*, 532 US at 83. This immediate purpose distinguished the current case from past cases in which the Court upheld warrantless searches under the “special needs” doctrine.

The provision of test results to authorities also implicated the requirement that a waiver of constitutional rights be “knowing.” Although as citizens

hospital employees would have a duty to turn over evidence of crime to the authorities, “when they undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients*, they have a special obligation to make sure that the patients are fully informed about their constitutional rights. . . .” *Id.*, 532 US at 85 (citation and footnote omitted).

In Michigan, a newborn suffering from narcotics withdrawal symptoms may properly be found within a trial court’s jurisdiction over abused or neglected children. *In re Baby X*, 97 Mich App 111, 113–16 (1980). However, a mother in Michigan cannot be charged with delivery of cocaine to a newborn on grounds that cocaine metabolites are transferred to the newborn through the umbilical cord following birth. *People v Hardy*, 188 Mich App 305 (1991).

D. The Exclusionary Rule

The exclusionary rule prohibits use of evidence in criminal proceedings that was directly or indirectly obtained through a violation of an accused’s constitutional rights. *Wong Sun v United States*, 371 US 471, 484–85 (1963), and *People v LoCicero (After Remand)*, 453 Mich 496, 508 (1996). The exclusionary rule is intended to deter violations of constitutional guarantees by removing the incentive to disregard those guarantees. “[D]espite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons.” *Brown v Illinois*, 422 US 590, 599–600 (1975), quoting *United States v Calandra*, 414 US 338, 348 (1974). The rule has been deemed inapplicable to civil child protection proceedings. *State ex rel AR v CR*, 982 P2d 73, 76 (Utah 1999). In addition, where no government official is involved in an illegal search or seizure, the objects seized may be admitted at a criminal trial. *Burdeau v McDowell*, 256 US 465, 475 (1921). However, if a search has been ordered or requested by a government official or the search and seizure is a joint endeavor of the private individual and the government official, the exclusionary rule may apply. *Corngold v United States*, 367 F2d 1, 5–6 (CA 9, 1966), and *United States v Ogden*, 485 F2d 536, 538–39 (CA 9, 1973).

2.16 DHS Access to Confidential Records to Investigate Suspected Abuse or Neglect

The DHS has an affirmative duty to investigate alleged abuse or neglect, to prevent further abuse, to safeguard and enhance the welfare of the child, and to preserve family life where possible. MCL 722.628(2). This often requires the DHS to examine otherwise confidential records of other agencies.

A. Medical Records

Physicians have a statutory duty to make the necessary examinations and submit a written report to the DHS. MCL 722.626(2). This report must be provided to the DHS even without parental consent or release. OAG, 1978, No 5406, p 724 (December 15, 1978). In addition to this duty and the duty to report suspected child abuse or neglect under MCL 722.623(1),* physicians and other health care providers, and the Department of Public Health, may have a duty to release certain information to the DHS. See MCL 333.16281(5).

The DHS may obtain access to otherwise confidential records of the Michigan Department of Public Health. If there is a compelling need for medical records or information to determine whether child abuse or neglect has occurred or to take action to protect a child where there may be a substantial risk of harm, the Department of Public Health must provide access to the child's medical records and information pertinent to an investigation. This access must be given to a DHS caseworker or administrator directly involved in the investigation. Records or information disclosed must include the identity of the individual to whom the record or information pertains. MCL 333.2640(2). Consent to release of records or information is not required. MCL 333.2640(3).

The Department of Public Health must provide access to pertinent records or information within 14 days of the receipt of a written request from a DHS caseworker or administrator directly involved in the investigation. MCL 333.2640(3).

In addition, the DHS may obtain access to the records of a licensee or registrant of the Michigan Department of Public Health. If there is a compelling need for medical records or information to determine whether child abuse or neglect has occurred or to take action to protect a child where there may be a substantial risk of harm, a DHS caseworker or administrator directly involved in the investigation must request in writing records and information pertinent to the investigation. The licensee or registrant must release pertinent records or information, if any, within 14 days of the request. MCL 333.16281(1). See also 45 CFR 164.512(b)(1)(ii) (under the Health Insurance Portability & Accountability Act of 1996, PL 104-191, a "covered entity" may disclose "protected health information" to a governmental agency charged with receiving reports of child abuse or neglect), MCL 333.16648(1) and (2)(h) (disclosure requirements apply to dentists), MCL 333.18117 (disclosure requirements apply to licensed professional counselors and limited licensed counselors), MCL 333.18237 (disclosure requirements apply to psychologists), and MCL 330.1748a (disclosure requirements apply to mental health professionals).

*See Section 2.2, above, discussing "mandatory reporters" of abuse or neglect.

*See Section 11.3 for a discussion of the abrogation of evidentiary privileges in child protective proceedings.

The following privileges* do not apply to medical records or information released or made available by a licensee or registrant:

- the physician-patient privilege;
- the dentist-patient privilege;
- the licensed professional counselor-client privilege, and the limited licensed counselor-patient privilege;
- the psychologist-patient privilege; and
- any other health professional-patient privilege created or recognized by law.

MCL 333.16281(2)(a)–(e).

B. School Records

The Family Educational and Privacy Rights Act, 20 USC 1232g et seq., governs the release of school records to a child's parent or third parties. A student's parents are entitled to access to their child's education records. 20 USC 1232g(a)(1)(A). For release of records to third parties, the parent's consent is required unless one of several exceptions is met. 20 USC 1232g(b)(1). Records may also be released pursuant to a court order or subpoena if parents and students are notified in advance of the release. 20 USC 1232g(b)(2)(B). See also MCL 600.2165, which prohibits school employees from disclosing records or confidences without the consent of a parent or legal guardian if the child is under 18 years of age.

C. Records of Drug Counseling

Records of the identity, diagnosis, prognosis, or treatment of any patient in any federal or state drug or alcohol abuse prevention program are confidential. 42 USC 290dd—2(a) and MCL 333.6111. Disclosure is permissible with the consent of the patient or pursuant to a court order and subpoena. 42 USC 290dd—2(b) and MCL 333.6112 and 333.6113. For the required contents of the consent form, see 42 CFR 2.31 and SCAO Form MC 315 (Authorization for Release of Medical Information).

A court order is required to initiate or substantiate criminal charges against a patient or to conduct any investigation of the patient. 42 USC 290dd—2(c) and MCL 333.6113(c). A court order may also authorize disclosure of confidential communications made by a patient if disclosure is necessary to protect against an existing threat to life, a threat of serious bodily injury, including circumstances that constitute suspected child abuse or neglect and verbal threats against third parties, or if disclosure is necessary to investigate or prosecute criminal child abuse or neglect. 42 CFR 2.63(a)(1)–(2).

In *In re Baby X*, 97 Mich App 111 (1980), within 24 hours of its birth, the baby began to show signs of drug withdrawal. On appeal, the baby's mother argued that a conflict exists between the federal law mandating confidentiality of drug or alcohol treatment records and state law mandating disclosure of suspected child abuse or neglect. The Court of Appeals, citing two New York cases, *In the Matter of Dwayne G*, 97 Misc 2d 333 (1978), and *In the Matter of the Doe Children*, 93 Misc 2d 479 (1978), held that where treatment records are necessary and material to the state's proof of neglect, a court of competent jurisdiction may authorize disclosure of the confidential information. *Baby X*, *supra*, at 120–21. The Court also noted that “any conflict between Federal and state law can be avoided by filing a John or Jane Doe petition with the disclosure of any names and confidential information to follow the issuance of a court order upon ‘good cause.’” *Id.* at 121.

D. Mental Health Records

Information in the records of a recipient of mental health services is confidential and may only be disclosed pursuant to MCL 330.1748 or MCL 330.1748a. MCL 330.1748(1). Confidential information may be disclosed when necessary to comply with another provision of law (such as the duty to report suspected child abuse or neglect) or pursuant to court order. MCL 330.1748(5)(a) and (d). See OAG, 1998, No 6976 (March 26, 1998) (CPS workers are entitled to access community mental health records of the involved children and relevant records of other recipients of community mental health services).

Under MCL 330.1748a, mental health professionals have the same duties as other health care providers to release pertinent records or information to a DHS caseworker or administrator directly involved in an investigation of suspected abuse or neglect.*

*See Section 2.16(A), above, for a discussion of these duties.

E. Friend of the Court Records

Children's Protective Services personnel must be given access to Friend of the Court records related to the investigation of alleged child abuse and neglect. MCR 3.218(D).

F. Access to Information on LEIN

A state or county employee engaged in the enforcement of the child protection laws or rules of this state must be ensured access to information on the Law Enforcement Information Network concerning an individual being investigated. MCL 28.214(1)(a)(ii). Children's Protective Services workers must do a LEIN check regarding “all significant adults living in, or part of [sic], the [child's] household, including non-parent adults, for all sexual abuse, serious physical abuse, suspected caretaker substance abuse,

drug exposed infant cases, and cases where domestic violence allegations may be present.” DHS *Services Manual*, CFP 713-2.

2.17 DHS Registry of Reports of Abuse and Neglect

*See Section 2.19, below, for discussion of these categories.

The DHS is required to maintain a statewide electronic registry to carry out the purposes of the Child Protection Law. MCL 722.627(1). The “central registry” contains reports filed under the Child Protection Law in which relevant and accurate evidence of child abuse or child neglect is found. MCL 722.622(c). See also MCL 722.622(d) (“central registry case” means a case classified under Category I or II*), and MCL 722.622(m) (Child Protective Service Information System (“CPSI”), the internal records system of the DHS, is not subject to the rules governing the central registry).

*See Section 2.18, below.

If it classifies a report of suspected abuse or neglect as a “central registry case,” the DHS must maintain a record in the central registry. Within 30 days after the classification, the DHS must notify in writing each person who is named in the record as a perpetrator of the abuse or neglect. This notice must state that information in the record may be released under MCL 722.627d.* MCL 722.627(4).

*The provision requiring maintenance of records until the perpetrator’s death is effective August 1, 1999. See 1998 PA 485.

If the investigation of a report fails to disclose evidence of abuse or neglect, information identifying the subject of the report must be expunged from the central registry. If evidence of abuse or neglect exists, the DHS must maintain the information in the central registry until it receives reliable information that the perpetrator of the abuse or neglect is dead. MCL 722.627(7).*

Amendment or expungement of record. A person who is the subject of a report or record may request that the DHS amend an inaccurate report or record from the central registry and local office file, or expunge from the central registry a report or record in which no relevant and accurate evidence of abuse or neglect is found to exist. MCL 722.627(5). “‘Expunge’ means to physically remove or eliminate and destroy a record or report.” MCL 722.622(q). “Relevant evidence” is defined as “evidence having a tendency to make the existence of a fact that is at issue more probable than it would be without the evidence.” MCL 722.622(v). Reports or records filed in a local office are subject to expunction only as authorized by the DHS, if considered in the best interest of the child. MCL 722.627(5).

If the DHS refuses the request for expunction or amendment or fails to act within 30 days of the request, the agency must hold a hearing on the issue, at which the standard of proof is a preponderance of the evidence. MCL 722.627(6).

2.18 Access to DHS's Registry

MCL 722.627(2)(a)–(r) lists the persons or entities who have access to DHS's central registry. MCL 722.627(2) states as follows:

“Unless made public as specified information released under [MCL 722.627d], a written report, document, or photograph filed with the [DHS] is a confidential record available only to 1 or more of the following:

- (a) A legally mandated public or private child protective agency investigating a report of known or suspected child abuse or neglect.
- (b) A police or other law enforcement agency investigating a report of known or suspected child abuse or neglect.
- (c) A physician who is treating a child whom the physician reasonably suspects may be abused or neglected.
- (d) A person legally authorized to place a child in protective custody if the confidential record is necessary to determine whether to place the child in protective custody.
- (e) A person, agency, or organization, including a multidisciplinary case consultation team, authorized to diagnose, care for, treat, or supervise a child or family who is the subject of a report or record under [the Child Protection Law], or who is responsible for the child's health or welfare.*
- (f) A person named in the report or record as a perpetrator or alleged perpetrator of the child abuse or neglect or a victim who is an adult at the time of the request, if the identity of the person who made the report is protected as provided in [MCL 722.625].
- (g) A court that determines the information is necessary to decide an issue before the court.
- (h) A grand jury that determines the information is necessary to conduct the grand jury's official business.
- (i) A person, agency, or organization engaged in a bona fide research or evaluation project. The person, agency, or organization shall not release

*This provision does not apply to “nonparent adults.” See Section 2.1(C), above.

information identifying a person named in the report or record unless that person's written consent is obtained. The person, agency, or organization shall not conduct a personal interview with a family without the family's prior consent and shall not disclose information that would identify the child or the child's family or other identifying information. The department director may authorize the release of information to a person, agency, or organization described in this subdivision if the release contributes to the purposes of this act and the person, agency, or organization has appropriate controls to maintain the confidentiality of personally identifying information for a person named in a report or record made under this act.

(j) A lawyer-guardian ad litem or other attorney appointed as provided by [MCL 722.630].

(k) A child placing agency licensed under . . . MCL 722.111 to 722.128 for the purpose of investigating an applicant for adoption, a foster care applicant or licensee or an employee of a foster care applicant or licensee, an adult member of an applicant's or licensee's household, or other persons in a foster care or adoptive home who are directly responsible for the care and welfare of children, to determine suitability of a home for adoption or foster care. The child placing agency shall disclose the information to a foster care applicant or licensee under . . . MCL 722.111 to 722.128, or to an applicant for adoption.

(l) Family division of circuit court staff authorized by the court to investigate foster care applicants and licensees, employees of foster care applicants and licensees, adult members of the applicant's or licensee's household, and other persons in the home who are directly responsible for the care and welfare of children, for the purpose of determining the suitability of the home for foster care. The court shall disclose this information to the applicant or licensee.

(m) Subject to [MCL 722.627a], a standing or select committee or appropriations subcommittee of either house of the legislature having jurisdiction over child protective services matters.

(n) The children's ombudsman appointed under the children's ombudsman act . . . , MCL 722.921 to 722.935.

(o) A child fatality review team established under [MCL 722.627b] and authorized under that section to investigate and review a child's death.

(p) A county medical examiner or deputy county medical examiner appointed under . . . MCL 52.201 to 52.216, for the purpose of carrying out his or her duties under that act.

(q) A citizen review panel established by the department. Access under this subdivision is limited to information the department determines is necessary for the panel to carry out its prescribed duties.

(r) A child care regulatory agency.

(s) A foster care review board for the purpose of meeting the requirements of 1984 PA 422, MCL 722.131 to 722.139a."

"Specified information." "Specified information" is defined in MCL 722.622(y) as follows:

"'Specified information' means information in a children's protective services case record related specifically to the department's actions in responding to a complaint of child abuse or neglect. Specified information does not include any of the following:

(i) Except as provided in this subparagraph regarding a perpetrator of child abuse or neglect, personal identification information for any individual identified in a child protective services record. The exclusion of personal identification information as specified information prescribed by this subparagraph does not include personal identification information identifying an individual alleged to have perpetrated child abuse or neglect, which allegation has been classified as a central registry case.

(ii) Information in a law enforcement report as provided in section 7(8).

(iii) Any other information that is specifically designated as confidential under other law.

(iv) Any information not related to the department's actions in responding to a report of child abuse or neglect."

For the rules governing release of "specified information," see MCL 722.627c–i. For a general discussion of the procedures required by those statutes, see *Detroit Free Press, Inc v Family Independence Agency*, 258 Mich App 544 (2003).

*Subsections (2)(a) and (b) refer to public or private child protective agencies and law enforcement agencies investigating suspected abuse or neglect; subsection (n) refers to the Children's Ombudsman.

Identity of reporter. MCL 722.625 states that "[e]xcept for records available under section 7(2)(a), (b), and (n),* the identity of a reporting person is confidential subject to disclosure only with the consent of that person or by judicial process."

Disclosure of other information. Persons or entities listed above to whom information is disclosed shall make the information available only to other persons or entities listed above. MCL 722.627(3). See *Zimmerman v Owens*, 221 Mich App 259 (1997) (attorney in divorce proceeding could not be held civilly liable for attaching protective services report to a motion in a divorce case, as MCL 722.627(2)(g) allows disclosure where a court determines that the information is necessary to decide an issue before it), and *Warner v Mitts*, 211 Mich App 557, 560–61 (1995) (disclosure was necessary to determine whether a report of suspected sexual abuse was false and slanderous).

The DHS shall not include a police report related to an ongoing investigation of suspected child abuse or neglect when releasing information to authorized persons or entities. The agency may, however, release reports of a person's convictions of crimes related to child abuse or neglect. MCL 722.627(8).

2.19 Required Response by the DHS Following Investigation

After completing its investigation and based on the results of that investigation, the DHS must determine in which category below to classify the allegations of abuse or neglect. MCL 722.628(11).

The categories, and the required DHS response, are as follows:

"(a) Category V - services not needed. Following a field investigation, the department determines that there is no evidence of child abuse or neglect.

"(b) Category IV - community services recommended. Following a field investigation, the department determines that there is not a preponderance of evidence of child abuse or neglect, but the structured decision-

making tool indicates that there is future risk of harm to the child. The department shall assist the child's family in voluntarily participating in community-based services commensurate with the risk to the child.

“(c) Category III - community services needed. The department determines that there is a preponderance of evidence of child abuse or neglect, and the structured decision-making tool indicates a low or moderate risk of future harm to the child. The department shall assist the child's family in receiving community-based services commensurate with the risk to the child. If the family does not voluntarily participate in services, or the family voluntarily participates in services, but does not progress toward alleviating the child's risk level, the department shall consider reclassifying the case as category II.

“(d) Category II - child protective services required. The department determines that there is evidence of child abuse or neglect, and the structured decision-making tool indicates a high or intensive risk of future harm to the child. The department shall open a protective services case and provide the services necessary under this act. The department shall also list the perpetrator of the child abuse or neglect, based on the report that was the subject of the field investigation, on the central registry, either by name or as ‘unknown’ if the perpetrator has not been identified.

“(e) Category I - court petition required. The department determines that there is evidence of child abuse or neglect and 1 or more of the following are true:

- (i) A court petition is required under another provision of this act.
- (ii) The child is not safe and a petition for removal is needed.
- (iii) The department previously classified the case as category II and the child's family does not voluntarily participate in services.
- (iv) There is a violation, involving the child, of [MCL 750.520g (assault with intent to commit criminal sexual conduct), attempt or conspiracy to commit criminal sexual conduct, a felony assault, or MCL 750.145c (child sexually abusive material or activity)] or of child abuse in the first or second degree as prescribed by section 136b of

the Michigan penal code, 1931 PA 328, MCL 750.136b.

“(2) In response to a category I classification, the department shall do all of the following:

(a) If a court petition is not required under another provision of this act, submit a petition for authorization by the court under section 2(b) of chapter XIA of the probate code of 1939, 1939 PA 288, MCL 712A.2.

(b) Open a protective services case and provide the services necessary under this act.

(c) List the perpetrator of the child abuse or neglect, based on the report that was the subject of the field investigation, on the central registry, either by name or as ‘unknown’ if the perpetrator has not been identified.” MCL 722.628d(1)–(2).

Note: Prior to a 1999 amendment to the Child Protection Law, following an investigation by the DHS, a case was either “substantiated” if a preponderance of the evidence supported the allegation of abuse or neglect, or “unsubstantiated.” “Substantiated” now means a case classified as a “central registry case.” MCL 722.622(aa). A “central registry case,” in turn, is now defined as a case classified under Category I or II, or, for cases investigated before July 1, 1999, a case in which the allegations were “substantiated” by a preponderance of the evidence. MCL 722.622(d). An “unsubstantiated” case “means a child protective services case the department classifies under sections 8 and 8d as category III, category IV, or category V.” MCL 722.622(bb).

Use of “Structured Decision-making Tool.” The DHS uses a “Structured Decision-making Tool” to measure the risk of future harm to a child. See DSS-4752 (P3) (3-95). MCL 722.622(z).

MCL 722.628d(3)–(4) provide different investigation requirements when the suspected perpetrator of child abuse or neglect is a non-parent adult who does not reside in the child’s home or an owner, operator, volunteer, or employee of a child care organization or adult foster care home. Those provisions state as follows:

“(3) The department is not required to use the structured decision-making tool for a nonparent adult who resides outside the child’s home who is the victim or alleged victim of child abuse or neglect or for an owner, operator, volunteer, or employee of a licensed or registered child

care organization or a licensed or unlicensed adult foster care family home or adult foster care small group home as those terms are defined in section 3 of the adult foster care facility licensing act, 1979 PA 218, MCL 400.703.

“(4) If following a field investigation the department determines that there is a preponderance of evidence that an individual listed in subsection (3) was the perpetrator of child abuse or neglect, the department shall list the perpetrator of the child abuse or neglect on the central registry.”

2.20 Who May File a Petition Seeking Court Jurisdiction

MCL 712A.11(1) allows “a person” to give to a court information concerning a child, and the court may then take appropriate action concerning the child. Typically, either a CPS worker or a prosecuting attorney acting on behalf of the DHS drafts and files a petition seeking court jurisdiction over a child suspected of being abused or neglected. However, school officials may file petitions alleging “educational neglect” under MCL 712A.2(b)(1),* and the Children’s Ombudsman, guardians, legal custodians, and foster parents (as “concerned persons”) may file petitions seeking termination of parental rights. If a person or agency other than a prosecuting attorney or DHS files a petition, the court may refer the matter to the DHS for investigation.

Note: The Children’s Ombudsman may file a petition on behalf of a child requesting the Family Division to assume jurisdiction over the child pursuant to MCL 712A.2(b), or a petition seeking to terminate parental rights under MCL 712A.19b,* if the ombudsman is satisfied that a complainant has contacted the DHS, the prosecuting attorney, the child’s attorney, and the child’s guardian ad litem, if any, and that none of these persons intends to file a petition. MCL 722.927(5). See MCL 722.922(i) (definition of “complainant”), MCL 722.923 (description of Children’s Ombudsman).

*But see Section 2.1(B). The DHS will not investigate a report alleging *only* a child’s failure to attend school.

*See also Section 18.3 for a list of persons who have standing to request termination of parental rights.

2.21 Time Requirements for Filing a Petition in Cases Involving Severe Physical Injury or Sexual Abuse

Within 24 hours after the DHS determines that a child was severely physically injured or sexually abused,* the agency must file a petition seeking Family Division jurisdiction under MCL 712A.2(b). MCL 722.637.

*See Section 2.1(A), above, for definitions of “severe physical injury” and “sexual abuse.”

2.22 Required Request for Termination of Parental Rights at Initial Dispositional Hearing

The DHS must file a petition seeking Family Division jurisdiction of the child under MCL 712A.2(b) if any of the following circumstances exist:

“(a) The department determines that a parent, guardian, or custodian, or a person who is 18 years of age or older and who resides for any length of time in the child’s home, has abused the child or a sibling of the child and the abuse included 1 or more of the following:

- (i) Abandonment of a young child.
- (ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.
- (iii) Battering, torture, or other severe physical abuse.
- (iv) Loss or serious impairment of an organ or limb.
- (v) Life threatening injury.
- (vi) Murder or attempted murder.

“(b) The department determines that there is risk of harm to the child and either of the following is true:

- (i) The parent’s rights to another child were terminated as a result of proceedings under section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, or a similar law of another state.
- (ii) The parent’s rights to another child were voluntarily terminated following the initiation of proceedings under section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, or a similar law of another state.” MCL 722.638(1)(a)–(b).

In a mandatory petition filed under MCL 722.638(1)(a)–(b), if a parent is a suspected perpetrator of the abuse or is suspected of placing the child at an unreasonable risk of harm due to the parent’s failure to take reasonable steps to intervene to eliminate that risk, the DHS must include in the mandatory petition a request for termination of parental rights at the initial dispositional hearing.* MCL 722.638(2) states as follows:

“In a petition submitted as required by subsection (1), if a parent is a suspected perpetrator or is suspected of

*See Chapter 18 for a complete discussion of hearings to terminate parental rights.

placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk, the family independence agency shall include a request for termination of parental rights at the initial dispositional hearing as authorized under section 19b of chapter XIA of 1939 PA 288, MCL 712A.19b.”

Note: MCL 722.638 was amended in 1998 to clarify when the DHS is required to file a petition, and when that petition must contain a request for termination of parental rights. See 1998 PA 428, repealing 1998 PA 383. The amended provision, quoted above, is effective March 23, 1999. Under the provision in effect prior to March 23, 1999, the DHS was not required to determine, before filing a petition for court jurisdiction, that there was risk of harm to the child of a parent who had previously had his or her parental rights to another child terminated, and there was no requirement that the parent be the perpetrator or suspected of placing the child at an unreasonable risk of harm before the DHS was required to request termination of parental rights at the initial dispositional hearing.

In *In re AH*, 245 Mich App 77, 79 (2001), the petition alleged the following facts:

“ . . . (1) that petitioner had filed three previous child protection petitions with respect to respondent's other children, (2) that since the birth of her most recent child on January 15, 1998, respondent had been arrested twice for domestic violence, (3) that she had left the child in the care and custody of her cohabitant, Robert Huiskens, who had a long history of substance abuse leading to several arrests and who had been listed twice as a perpetrator of abuse or neglect of a child, and (4) that respondent had a long history of mental illness and was not taking appropriate medication, which placed the child at risk of harm. Petitioner requested an order terminating respondent's parental rights.”

Respondent-mother argued that MCL 722.638(1)(b)(ii) and (2) violated Equal Protection and Due Process guarantees under the state and federal constitutions. Although the prior version of MCL 722.638 was in effect at the time the petition was filed in this case, the respondent chose to challenge the amended version of the statute. The Court of Appeals found that respondent had standing to challenge the amended statute since she was attacking language present in both the prior and amended versions of the statute—“namely, that under certain circumstances petitioner lacks discretion regarding whether to request termination of the parent's rights.” *In re AH*, *supra* at 81. The Court first applied the “strict scrutiny” standard

to the Equal Protection claim and found no constitutional violation. *Id.* at 83. The statute serves a compelling state interest in protecting children from unreasonable risk of harm. More importantly, the Court found that the statute was “precisely tailored” to serve this interest:

“We further conclude that the statute is ‘precisely tailored’ to serve this interest. The doctrine of anticipatory neglect recognizes that ‘how a parent treats one child is certainly probative of how that parent may treat other children.’ *In re LaFlure*, 48 Mich. App. 377, 392; 210 N.W.2d 482 (1973). See also *In re Dittrick*, 80 Mich. App. 219, 222; 263 N.W.2d 37 (1977). In *In re Powers*, 208 Mich. App. 582, 591-592; 528 N.W.2d 799 (1995), this Court extended the doctrine of anticipatory neglect ‘to guarantee the protection of a child who is not yet born, i.e., because of the past conduct of another person, there is good reason to fear that the second child, when born, will also be neglected or abused.’ The current version of the statute requires petitioner to commence proceedings against parents who in the past have had their parental rights terminated, voluntarily or otherwise. The Legislature therefore effectively codified the doctrine of anticipatory neglect and then added the additional element of a risk of harm to the child. To this extent, the challenged provisions target children whose parents have had their parental rights terminated in the past and who are at risk of harm. We doubt that the statute need have been any more carefully tailored to protect our state’s interest in safeguarding its most vulnerable citizens. Therefore, while the statute does in effect create a separate class of parents, we do not conclude that it violates equal protection.” *AH, supra* at 84–85.

With regard to the alleged procedural due process violation, the Court concluded that the risk of erroneous deprivation of parental rights was insufficient to invalidate the statute:

“Respondent argues that the requirement that petitioner request termination under the circumstances stated in the statute is not sufficiently flexible and creates a risk that a person’s rights will be terminated erroneously. We reject this argument. After filing the petition, petitioner must still satisfy the statute’s ‘risk of harm’ requirement and establish that the parent is ‘a suspected perpetrator or . . . suspected of placing the child at an unreasonable risk of harm due to the parent’s failure to take reasonable steps to intervene to eliminate that risk.’ Further, a request for termination does not necessarily mean that the court will

grant the request. As our Supreme Court discussed in *In re Trejo*, 462 Mich. 341, 356; 612 N.W.2d 407 (2000), the ‘best interests’ provision of MCL 712A.19b(5); MSA 27.3178(598.19b)(5) allows the trial court to conclude that termination is clearly not in the child’s best interest. We therefore conclude that, on balance, MCL 722.638(1)(b)(ii); MSA 25.248(18)(1)(b)(ii) does not violate procedural due process.” *AH, supra* at 85–86.

Investigation requirements and plea agreements. DHS *Services Manual*, CFP 715-3, provides that CPS must conduct an investigation to determine whether there is current risk of harm. That finding must be by a preponderance of the evidence as in other cases of alleged abuse or neglect.

A CPS worker “should not initiate or negotiate a plea agreement with regard to a mandatory termination petition.” Legal counsel for DHS and a worker’s supervisor must approve such a plea agreement before a worker may support it on the record. *Id.*

Required conference to decide whether to request termination of parental rights at initial dispositional hearing. If the DHS is considering a request to terminate parental rights at the initial dispositional hearing, in cases where the agency is not required to request termination under MCL 722.638(1)(a)–(b) and (2), the agency must hold a conference among appropriate agency personnel to decide on a course of action. MCL 722.638(3) states as follows:

“If the department is considering petitioning for termination of parental rights at the initial dispositional hearing as authorized under section 19b of chapter XIA of 1939 PA 288, MCL 712A.19b, even though the facts of the child’s case do not require departmental action under subsection (1), the department shall hold a conference among the appropriate agency personnel to agree upon the course of action. The department shall notify the attorney representing the child of the time and place of the conference, and the attorney may attend. If an agreement is not reached at this conference, the department director or the director’s designee shall resolve the disagreement after consulting the attorneys representing both the department and the child.”

2.23 Liability and Immunity

This section provides an overview of liability and immunity under Michigan law in the context of a child abuse or neglect case. Liability and immunity of state and local agencies and their agents under 42 USC 1983 is beyond the scope of this Benchbook. See, generally, *DeShaney v Winnebago*

County Dep't of Social Services, 489 US 189 (1988), *Hoffman v Harris*, 511 US 1060 (1994) (Thomas, J, dissenting), *Achterof v Selvaggio*, 886 F2d 826, 830 (CA 6, 1989), *Salyer v Patrick*, 874 F2d 374, 378 (CA 6, 1989), and *Martin v Children's Aid Society*, 215 Mich App 88, 94 (1996).

A. Civil and Criminal Liability Under the Child Protection Law

MCL 722.633 provides for criminal and civil liability for violations of the Child Protection Law:

“(1) A person who is required by this act to report an instance of suspected child abuse or neglect and who fails to do so is civilly liable for the damages proximately caused by the failure.

“(2) A person who is required by this act to report an instance of suspected child abuse or neglect and who knowingly fails to do so is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$500.00, or both.

“(3) Except as provided in section 7,* a person who disseminates, or who permits or encourages the dissemination of, information contained in the central registry and in reports and records made as provided in this act is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$100.00, or both, and is civilly liable for the damages proximately caused by the dissemination.

“(4) A person who willfully maintains a report or record required to be expunged under section 7 is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$100.00, or both.

“(5) A person who intentionally makes a false report of child abuse or neglect under this act knowing that the report is false is guilty of a crime as follows:

(a) If the child abuse or neglect reported would not constitute a crime or would constitute a misdemeanor if the report were true, the person is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$100.00, or both.

(b) If the child abuse or neglect reported would constitute a felony if the report were true, the

*See Sections 2.17–2.18, above.

person is guilty of a felony punishable by the lesser of the following:

- (i) The penalty for the child abuse or neglect falsely reported.
- (ii) Imprisonment for not more than 4 years or a fine of not more than \$2,000.00, or both.”

Civil liability for the failure of a mandatory reporter to report when required is limited under MCL 722.633(1) to a claim for damages on behalf of an identified child about whom no report was made. Furthermore, MCL 722.633(1) requires that damages be proximately caused by the failure to report. *Marcelletti v Bathani*, 198 Mich App 655, 659 (1993). In *Marcelletti*, the Court of Appeals concluded that a physician’s failure to report suspected child abuse by a babysitter was not the proximate cause of the harm suffered by another child at the babysitter’s hands. The physician treated the first child victim but not the second. *Id.* at 662–63.

For a case involving the criminal prosecution of a mandatory reporter for knowingly failing to report, see *People v Cavaiani*, 172 Mich App 706, 710–11 (1988).

Under MCL 722.633(3), except as provided in MCL 722.627(2), a person may be liable for dissemination of information made confidential under the Child Protection Law. MCL 722.627(2) lists circumstances under which dissemination of information from DHS’s central registry is permissible. In *Zimmerman v Owens*, 221 Mich App 259 (1997), an attorney in divorce proceedings attached a protective services report detailing alleged sexual abuse to a motion in the divorce case. The Court of Appeals held that MCL 722.627(2)(g) allows disclosure of such information where a court determines that the information is necessary to decide an issue before it. The report was necessary to determine custody and visitation issues in the divorce case. *Zimmerman, supra* at 263. Furthermore, the Court of Appeals held that the report, which was placed in a public court file in the divorce case, was not disseminated as required by MCL 722.633(3). *Zimmerman, supra* at 263–64.

B. Immunity Under the Child Protection Law

MCL 722.625 provides for immunity in certain circumstances. That statute states in part:

“ . . . A person acting in good faith who makes a report, cooperates in an investigation, or assists in any other requirement of this act is immune from civil or criminal liability that might otherwise be incurred by that action. A person making a report or assisting in any other requirement of this act is presumed to have acted in good

faith. This immunity from civil or criminal liability extends only to acts done according to this act and does not extend to a negligent act that causes personal injury or death or to the malpractice of a physician that results in personal injury or death.”

By providing immunity under the Child Protection Law for persons who report suspected child abuse or neglect in good faith, “the Legislature intended to abrogate established immunity rules of the common law related to persons required to report abuse and neglect.” *Williams v Coleman*, 194 Mich App 606, 615 (1992). MCL 722.625 “clearly and unambiguously provides immunity to persons who file a child abuse report in good faith.” *Awkerman v Tri-County Orthopedic Group, Inc.*, 143 Mich App 722, 726 (1985). “Good faith” refers to whether or not the person who reports suspected abuse or neglect has reasonable cause to suspect the abuse or neglect, not whether the reporter has animosity toward the person suspected of abusing or neglecting the child. *Warner v Mitts*, 211 Mich App 557, 560 (1995). Immunity under MCL 722.625 also extends to acts done in cooperation with an ongoing investigation. *Warner, supra*.

Violations of other provisions of the Child Protection Law prevent immunity. MCL 722.625 does not provide immunity to persons who act in good faith but violate other provisions of the Child Protection Law. *Lavey v Mills*, 248 Mich App 244, 252 (2001). In *Lavey*, a teacher’s aide noted abnormal conditions in the child’s genital area and reported it to the school’s principal. The principal reported suspected sexual abuse to a state police officer. Five weeks later, the principal reported additional symptoms in the child’s genital area to the state police officer. The state police officer directed the principal to transport the child to a doctor’s office and contacted a CPS worker and asked him to meet the officer at the doctor’s office. The state police officer did not obtain a search warrant or other court order. Purporting to be the child’s legal guardian, the CPS worker signed a consent form authorizing a gynecological examination of the child. No attempt was made to contact the child’s parents. The examination revealed no evidence of sexual abuse. The police officer did not inform anyone of the results but did accuse the child’s father of molesting the child.

The child’s conservator sued the principal, the state police officer, and the CPS worker, alleging false imprisonment for taking the child to the doctor’s office without a court order, battery for conducting the examination, and violation of the child’s right to be free from unreasonable searches and seizures. The defendants claimed immunity under both MCL 691.1407(2) and MCL 722.625, and argued that the alleged constitutional violation did not state a claim upon which relief could be granted. The trial court granted the defendants’ motions for summary disposition. The Court of Appeals affirmed the trial court’s grant of summary disposition to all defendants on plaintiff’s constitutional claim and the trial court’s grant of summary disposition to the school principal on the other claims. However, the Court of Appeals reversed the trial court’s grant of summary disposition to the

state police officer and CPS worker on the battery and false imprisonment claims.

The Court of Appeals first held that “no inferred damages remedy for a violation of a state constitutional right exists against individual government employees.” *Lavey, supra* at 250, citing *Jones v Powell*, 462 Mich 329, 335 (2000). The Court of Appeals also held that summary disposition was properly granted to the school principal because the conditions in the child’s genital area gave the principal “reasonable cause to suspect child abuse,” and a person who has “reasonable cause” acts, by definition, in good faith when reporting the suspected abuse. *Lavey, supra* at 254, citing *Warner, supra* at 559. Furthermore, MCL 722.628(8) requires schools to cooperate with child abuse investigations, including allowing access to the child without parental consent if the DHS determines that such access is necessary to complete the investigation or prevent further abuse or neglect. Thus, the Court of Appeals concluded that the principal acted in good faith when she transported the child to the doctor’s office, at the state police officer’s direction, without obtaining parental consent.

With regard to the state police officer’s and CPS worker’s immunity under MCL 722.625, the Court of Appeals concluded that such immunity does not “extend[] to good faith acts that violate other requirements set forth in the Child Protection Law.” *Lavey, supra* at 252. The Court of Appeals stated that the police officer and CPS worker violated MCL 722.626(3) by failing to seek a search warrant or other court order prior to the gynecological examination because the child’s health was not endangered and a court order could have easily been obtained. *Lavey, supra* at 256. Because MCL 722.625 only grants immunity from civil liability “for acts done pursuant to [the Child Protection Law],” the police officer and CPS worker were not entitled to immunity under that statute. *Lavey, supra* at 256–57.

The Court of Appeals also concluded that the police officer and CPS worker were not entitled to immunity under MCL 691.1407(2) because that immunity does not apply to an individual government employee’s intentional torts. *Lavey, supra* at 257, citing *Sudul v Hamtramck*, 221 Mich App 455, 458, 481 (1997).

Immunity under the Safe Delivery of Newborns Law.* MCL 712.2(4) provides:

“A hospital and a child placing agency, and their agents and employees, are immune in a civil action for damages for an act or omission in accepting or transferring a newborn under this chapter, except for an act or omission constituting gross negligence or willful or wanton misconduct. To the extent not protected by the immunity conferred by 1964 PA 170, MCL 691.1401 to 691.1415, an employee or contractor of a fire department or police station has the same immunity that this subsection

*See Section 2.5, above, for a brief description of responsibilities under the Safe Delivery of Newborns Law.

provides to a hospital's or child placing agency's agent or employee."

MCL 712.1(2)(g) defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

M Civ JI 14.12 defines "willful misconduct" as "conduct or a failure to act that was intended to harm the plaintiff." M Civ JI 14.11 defines "wanton misconduct" as "conduct or a failure to act that shows such indifference to whether harm will result as to be equal to a willingness that harm will result."

C. Immunity Under MCL 691.1407

Immunity for government agencies and government employees may also be available under MCL 691.1407, which states in relevant part:

"(1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

"(2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

- (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
- (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
- (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

“(3) Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986.

* * *

“(5) A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

“(6) A guardian ad litem is immune from civil liability for an injury to a person or damage to property if he or she is acting within the scope of his or her authority as guardian ad litem. This subsection applies to actions filed before, on, or after May 1, 1996.”

Prior to July 1, 1986, the effective date of MCL 691.1407, determination of the liability of CPS and state foster care workers was made by examining whether the act complained of was “discretionary” or “ministerial.” See *Williams v Coleman*, 194 Mich App 606 (1992), *Williams v Horton*, 175 Mich App 25 (1989), *Gilbert v Dep’t of Social Services*, 146 Mich App (1985), and *Walker v Gilbert*, 160 Mich App 674 (1987).

MCL 691.1407(2) does not apply to individual government employee’s intentional torts. *Lavey, supra* at 257, citing *Sudul v Hamtramck*, 221 Mich App 455, 458, 481 (1997).

As noted in MCL 691.1407(6), guardians ad litem enjoy immunity from suit for acts performed within the scope of their authority. It is unclear whether such immunity extends to lawyer-guardians ad litem appointed to represent children in child protective proceedings. See *Diehl v Danuloff*, 242 Mich App 120, 124 (2000), where the Court of Appeals held that a private psychologist was entitled to quasi-judicial immunity (absolute immunity) from liability in a negligence suit alleging negligence in performing a court-ordered custody evaluation and making recommendations to the court. In *Martin v Children’s Aid Society*, 215 Mich App 88, 97–98 (1996), the Court of Appeals extended absolute immunity to social workers employed by a private agency under contract with the state for placing and supervising children in foster care. In granting the social workers immunity from suit, the Court stated as follows:

“Professional assistance to the Probate Court is critical to its ability to make informed, life deciding judgments relating to its continuing jurisdiction over abused children. Its advisors and agents cannot be subject to potential suits by persons, aggrieved by the Court’s

decision vindictively seeking revenge against the Court’s assistant as surrogates for the jurist”

In *Beauford v Lewis*, 269 Mich App 295, 298–302 (2005), the Court extended absolute immunity to a CPS worker who conducted an investigation of alleged child abuse and recommended termination of the plaintiff’s parental rights. The Court rejected the plaintiff’s argument that *Martin v Children’s Aid Society*, 215 Mich App 88 (1996), did not apply because the investigation was not ordered or monitored by the court that conducted the child protective proceeding. In *Beauford*, the Court of Appeals concluded that CPS workers, like the social workers in *Martin*, acted as “advisors and agents” to the family court, and that the family court’s review of CPS investigations and recommendations provided parents with a sufficient remedy.

D. Immunity for Persons Providing Information in Response to a Court’s Request

MCR 3.924 provides immunity to persons or agencies who provide information to the court in response to a request from the court. That rule states as follows:

“Persons or agencies providing testimony, reports, or other information at the request of the court, including otherwise confidential information, records, or reports that are relevant and material to the proceedings following authorization of a petition, are immune from any subsequent legal action with respect to furnishing the information to the court.”

Interpreting the predecessor to MCR 3.924, which was substantially similar to the current rule, the Court of Appeals held that the rule provided absolute immunity only for defamatory statements. *Bolton v Jones*, 156 Mich App 642, 652–53 (1987), rev’d on other grounds 433 Mich 861 (1989). See, however, *Diehl v Danuloff*, 242 Mich App 120, 124 (2000), where the Court of Appeals held that a private psychologist was entitled to quasi-judicial immunity (absolute immunity) from liability in a suit alleging negligence in performing a court-ordered custody evaluation and making recommendations to the court.

E. Liability and Immunity of Child Placing Agencies, Foster Parents, and Guardians

Child placing agencies. Employees of a private child placing agency under contract with the DHS have absolute immunity to liability for initiating and maintaining placement of a child if the court has established jurisdiction over the child and is reviewing the child’s placement. *Martin v Children’s Aid Society*, 215 Mich App 88, 95–99 (1996). Such absolute immunity has

been extended to liability arising from placement *and supervision* of a child in foster care. *Spikes v Banks*, 231 Mich App 341, 346–47 (1998).

Foster parents and guardians. MCL 722.163 allows a foster child or child to maintain a negligence action against a foster parent or guardian. That statute states:

“(1) A foster child may maintain an action against his or her foster parent who is licensed under Act No. 116 of the Public Acts of 1973, being sections 722.111 to 722.128 of the Michigan Compiled Laws, and a child may maintain an action against his or her legal guardian for injuries suffered as a result of the alleged ordinary negligence of the foster parent or legal guardian except in either of the following instances:

- (a) If the alleged negligent act involves an exercise of reasonable parental authority over the child.
- (b) If the alleged negligent act involves an exercise of reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.

“(2) As used in this section, ‘legal guardian’ means a person appointed by a court of competent jurisdiction to exercise care and custody decisions over a minor.”

In *Spikes, supra*, a foster child sued her foster parent alleging that the foster parent allowed her nephew to reside in the home even though the nephew had been charged with criminal sexual conduct and other criminal offenses. The foster parent’s nephew and the foster child, then 15 years old, engaged in sexual activity, in violation of MCL 750.520b and 750.520c, and the foster child became pregnant. In her complaint, the foster child alleged facts supporting her allegation that the foster parent knew or should have known that the sexual activity was occurring. *Spikes, supra* at 343–45. The Court of Appeals held that the foster parent was not entitled to immunity under MCL 722.163(1). *Spikes, supra* at 352, 354. The Court of Appeals found that the foster child’s complaint alleged child neglect as defined by the Child Protection Law, “which as a matter of law is not a reasonable exercise of parental discretion. *Phillips[v Diehm]*, 213 Mich App 389, 396 (1995).” *Spikes, supra* at 352. The Court of Appeals in *Spikes* also concluded that the foster parent’s conduct was not “an exercise of reasonable parental discretion with respect to the provision of . . . housing . . . and other care.” *Id.* at 354. The Court summarized its position as follows:

“Although we hold that plaintiff’s allegations do not fall within one of the statutory exceptions, we recognize that

foster parents provide an important public service in caring for children in need of the state's protection. We wish to encourage rather than discourage citizens to take on this essential function. The Legislature has acknowledged this role in specifically granting foster parents the same measure of immunity from tort liability as that granted by case law to natural and adoptive parents. MCL 722.163(1); MSA 25.358(63)(1). That measure of immunity is not, however, total. The courts of this state have in fact generally abolished parental immunity, while carving out two specific exceptions to the general rule of abrogation. A parent or foster parent is immune only when the alleged negligent act involves an exercise of reasonable parental authority or when the alleged negligent act involves an exercise of reasonable parental discretion with respect to the provision of such things as food, clothing, and housing. *Plumley v Klein*, 388 Mich 1, 8 (1972); MCL 722.163(1); MSA 25.358(63)(1). In no other circumstances is a parent or foster parent immune from liability for negligence alleged by minor children or foster children. Moreover, our Legislature and courts have also emphasized the necessity of caregivers providing protection from sexual abuse to minors for whom they are responsible. *Phillips, supra* at 398; MCL 722.622(d)(ii); MSA 25.248(2)(d)(ii). As a society, we take these vulnerable children and place them in the homes of strangers. We have to know that they will be safe. Considering this important public policy, we cannot grant immunity to foster parents, parents, or other responsible adults in circumstances involving the sexual abuse of a minor when the caregiver knew or should have known of the abuse and did nothing to prevent it.”